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THE ENTRAPMENT DEFENSE IN FEDERAL COURTS: EMERGENCE OF A LEGAL DOCTRINE
Kenneth M. Murchison

COMMENTS

TERRITORIAL RESTRICTIONS UNDER THE SHERMAN ACT: CONFUSION IN THE AFTERMATH OF *SCHWINN*

STOPPING AND QUESTIONING SUSPECTED SHOPLIFTERS WITHOUT CREATING CIVIL LIABILITY

AN ANALYSIS OF MISSISSIPPI'S CRIMINAL LAW UNDER THE EQUAL RIGHTS AMENDMENT

THE FUEL ADJUSTMENT CLAUSE AND ITS ROLE IN THE REGULATORY PROCESS

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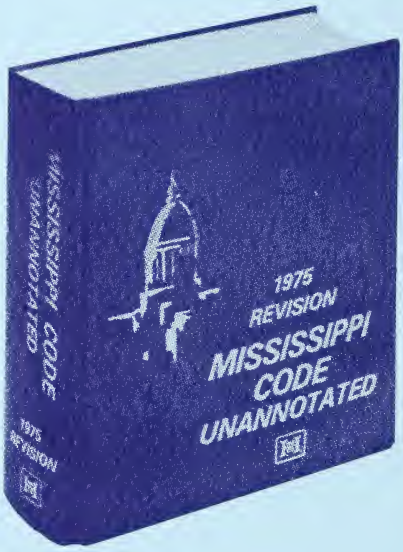

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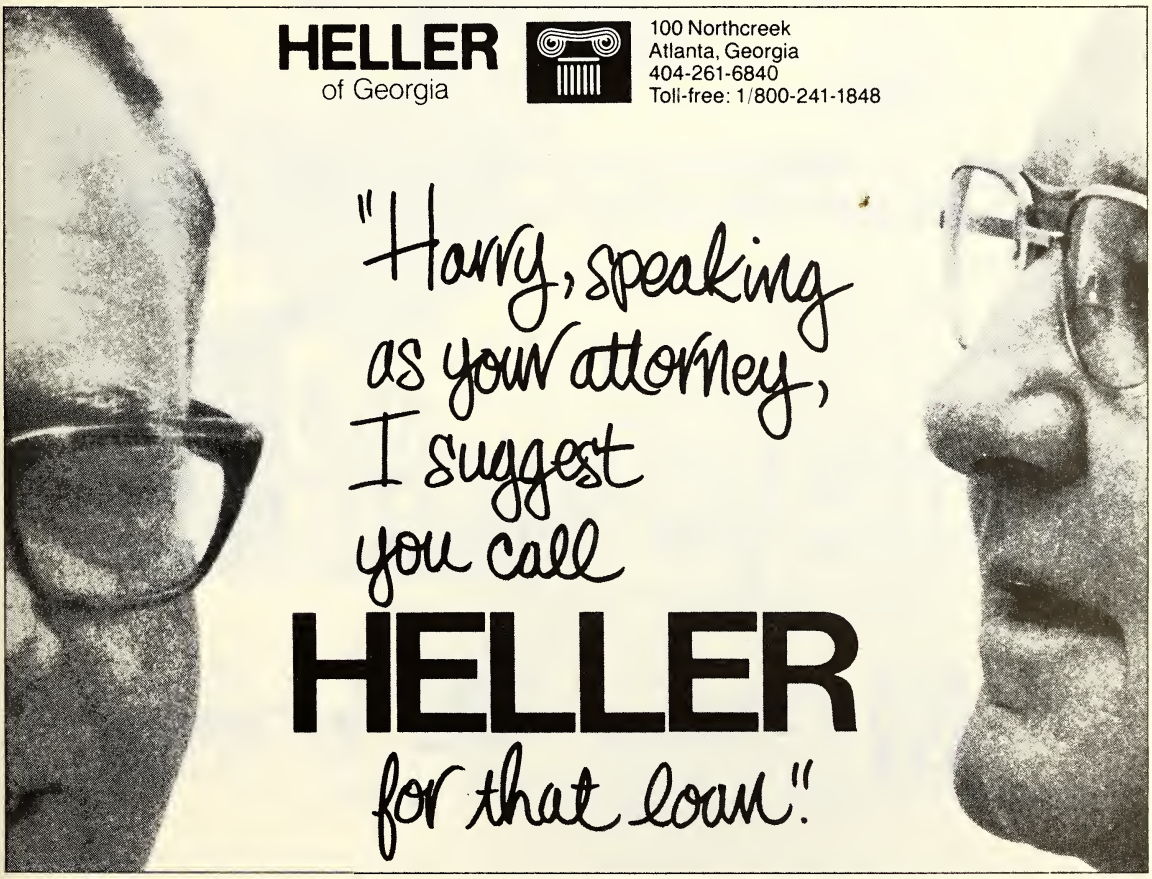

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TABLE OF CONTENTS

ARTICLES

Wrongful Death Damages—Fair Compensation for Future Pecuniary Loss Requires Consideration of Economic Trends and Income Tax Consequences ..... *Charles N. Dennis, William A. Sirmon, and Robert D. Drinkwater* 173

The Entrapment Defense in Federal Courts: Emergence of a Legal Doctrine ..... *Kenneth M. Murchison* 211

COMMENTS

Territorial Restrictions Under the Sherman Act: Confusion in the Aftermath of *Schwinn* 239

Stopping and Questioning Suspected Shoplifters Without Creating Civil Liability 260

An Analysis of Mississippi's Criminal Law Under the Equal Rights Amendment 279

The Fuel Adjustment Clause and its Role in the Regulatory Process 302

Probate of Lost Wills in Mississippi 318

RECENT DECISIONS

Deeds of Trust—Restraints Against Alienation—Due-on Clause is an Unreasonable Restraint on Alienation Absent a Showing of Protection of Mortgagee's Legitimate Interests (*Sanders v. Hicks*, Miss. 1975) 331

State Taxation—Corporations—Unitary Income of Affiliated Corporations not Apportionable in Same Manner as Unitary Income of Single Corporation (*Universal Manufacturing Corp. v. Brady*, Miss. 1975) 348

BOOK REVIEWS

What You Must Know to Manage a Charitable Foundation ..... *Karen Oakes Green* 361

How to Form Your Own Corporation Without a Lawyer for Under $50.00 ..... *E. Clifton Hodge, Jr.* 363

MISSISSIPPI LAW JOURNAL BACK ISSUES — CUMULATIVE INDEXES

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WRONGFUL DEATH DAMAGES — FAIR COMPENSATION FOR FUTURE PECUNIARY LOSS REQUIRES CONSIDERATION OF ECONOMIC TRENDS AND INCOME TAX CONSEQUENCES

Charles N. Dennis, William A. Sirmon** & Robert D. Drinkwater****

This article was written primarily to aid the attorney's understanding and evaluation of expert testimony in both wrongful death and permanent disability actions. An attempt has been made to point out the alternative value judgments faced by the expert throughout a sequence of calculations which best estimates future pecuniary loss. Though the particular expert's method of evaluation may differ from the one contained herein, common principles apply and similar value judgments must be made. The attorney should be aware of these variables both for attack and support purposes. In addition, mechanical defects in various calculation tools and the substantive problem of admissibility of the expert's testimony are discussed. The sample detailed calculation of death damages performed should be particularly helpful to the attorney. An understanding of this process gives the reader a sound base from which expert testimony of this nature can be evaluated.

In part IV the income tax consequences of lump sum compensation for future loss are discussed. For numerous reasons a majority of courts have chosen to exclude this aspect of damage calculation from the jury. Detailed treatment, however, leads to the conclusion that ignoring the income tax question results in payment, by defendant, of an amount in excess of fair compensation. The tone of this article is thus somewhat polemical in part IV and in part II where the effects of predicted inflation and productivity increases are treated. A look at the consequences that these factors produce in dollars and cents supports the argument that economic realities must be included in the calculation scheme.

I. An Overview

Even though "there is no mathematical formula"[1] established in

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***Editorial Board, *Mississippi Law Journal*.

[1] Dickey v. Parham, 295 So. 2d 284, 285 (Miss. 1974); Illinois Cent. R.R. v. Ragan, 252 Miss. 335, 340, 173 So. 2d 433, 435 (1965).

this state[2] by which wrongful death damages must be calculated, some formula must obviously be devised if death statutes are to fulfill consistently their purpose of compensating a decedent's survivors for the pecuniary loss occasioned by the death.[3] Any computation scheme should attempt, mathematically, to reproduce the lost income which would have been produced by decedent but for the death.

> In order to restore the lost stream of income it is necessary to secure a capital fund which, if invested at some established rate of interest, would yield a stream of income . . . equal to that lost by the wrongful death, and equal to zero at the end of the work-life expectancy of the deceased.[4]

While several jurisdictions allow an award only for the pecuniary loss which the survivors can prove to have suffered,[5] proper recovery in this state is for the present *net* cash value of the decedent's expectancy.[6]

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[2] In New Hampshire, the court may request special findings of fact and compute the damages according to an established formula. "Since computation is a scientific process based on ascertained facts, there could be no constitutional objection to the finding of the facts by the jury, and the subsequent doing of the mathematics by the court or an accountant named by the court as commissioner." Thibeault v. Brown, 92 N.H. 235, 239, 29 A.2d 461, 462 (1942). This practice had been suggested in the earlier case of Humphreys v. Ash, 90 N.H. 223, 6 A.2d 436, 440-41 (1939).

[3] In addition to pecuniary loss recoverable under MISS. CODE ANN. § 11-7-13 (Supp. 1975), plaintiff may claim gratuities which the survivor had reasonable expectations of receiving and the loss of society and companionship. Under a separate statute, MISS. CODE ANN. § 91-7-233 (1972), decedent's executor or administrator can recover liquidated damages and damages for pain and suffering. Thornton v. The Insurance Co. of N. America, 287 So. 2d 262 (Miss. 1973).

[4] Hamilton & Patterson, *The Economic Side of Wrongful Death Actions in New Mexico*, 2 N.M.L. REV. 127, 128 (1972).

[5] *E.g.*, FLA. STAT. ANN. §§ 768.16-.27 (Supp. 1972), *discussed in* Wilcox & Melville, *The Computation of Damages Under the New Florida Wrongful Death Act*, 26 U. MIAMI L. REV. 737 (1972); PA. STAT. ANN. tit. 12, §§ 1601-04 (Purdon's 1953); VA. CODE ANN. tit. 8, § 633 (Supp. 1975); W. VA. CODE ANN. § 55-7-6 (Supp. 1975); *see* D. DOBBS, LAW OF REMEDIES § 8.3, at 556 (1956).

[6] For a recent article discussing the loss to survivor-net cash value issue, see Luckett & Thomas, *Wrongful Death Damages in Mississippi*, 43 MISS. L.J. 633, 634-35 (1972). The authors report that in Gordon v. Lee, 208 Miss. 21, 43 So. 2d 665 (1949), the Mississippi Supreme Court reestablished the net cash value rule in wrongful death recoveries. Some inconsistency exists, however, in the opinions since *Gordon*. In Jeffreys v. Clark, 251 Miss. 129, 146, 168 So. 2d 662, 669 (1964), the court noted that recovery was for "the present value of the pecuniary advantage which the evidence disclosed the parties interested had a reasonable expectation of deriving from the deceased . . . ." This language is clearly contrary to a net cash value theory of recovery. In Illinois Cent. R.R. v. Ragan, 252 Miss. 335, 341, 173 So. 2d 443, 445 (1965), the court concerned itself with the question of decedent's dependents, which would be immaterial under *Gordon* except as to the issue of decedent's personal consumption, an issue not being considered. Evidence of a widow's remarriage, presumably sought to be introduced to reduce damages, was held admissible in Campbell v. Schmidt, 195 So. 2d 87, 90 (Miss. 1967). Under a proper interpretation of

Recovery, then, is in an amount which equals what decedent would have earned during the remainder of his expectancy,[7] less the amount which he would have expended on himself,[8] reduced to present value.[9]

A. The Expert's Role in Wrongful Death Cases

The extent of the expert's role in a wrongful death case depends on the case law of the jurisdiction and the alertness and discretion of opposing counsel.[10] The expert is often used simply as a human calculator. He may be asked to offer an opinion on reasonable interest rates, personal consumption expenditures, and statistical life expectancies, and then compute lump sum awards based on various combinations of these elements.[11] His testimony may also include valuations of future economic trends and probable life earning patterns. At this level the expertise of the economist-as-expert becomes important. Regardless of the extent of the testimony, the expert serves a useful function since calculation of the value of a life is no simple matter and would often be beyond the ken of the average jury.[12]

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the net cash value theory, this evidence would be immaterial since decedent's previous economic condition and future prospects are the only proper areas of inquiry. If by "contributions" the court in Boyd Constr. Co. v. Bilbro, 210 So. 2d 637, 643 (Miss. 1968), *noted in* 43 MISS. L.J. 633 (1972), meant economic gain derived from employment outside the home, it was inconsistent with the net cash value theory for the court to look into the life expectancy of the surviving husband when assessing damages.

If the present net cash value rule is intended to be followed, the court's inquiry logically must be restricted to the deceased as an economic being. The status of his or her dependents, if any, is relevant only to determine decedent's probable personal consumption. Otherwise, plaintiffs under the statute should be entitled to the same damages irrespective of whether decedent was survived by dependents. The net cash value rule is perhaps illogical and punitive in nature. Bush v. Watkins, 224 Miss. 238, 243-44, 80 So. 2d 19, 21-22 (1955). If used, however, it should be applied consistently.

[7] Expectancy is the financially productive years which would have been left to decedent but for the wrongful death. Whether this is measured by life expectancy or work expectancy depends on the particular facts. *See* part III *C infra*.

[8] This consideration, which we refer to as the personal consumption expenditure, is treated in greater detail in part III *F infra*.

[9] See part III *G infra*.

[10] Economic experts often manage to testify to matters probably inadmissible under the state's decisional law. See part II *infra*. Whether this is due to mistake or counsel's discretion cannot be determined. Even when objected to, however, testimony of the nature described herein (inclusion of predicted economic trends in calculations) was admitted in the majority of cases in which two of the authors have participated.

[11] Expert testimony using actual figures and culminating in a lump sum opinion has, on occasion, been held inadmissible because of an alleged tendency to mislead the jury into acceptance of these amounts as stated. Wetherbee v. Elgin, J. & E. Ry., 191 F.2d 302 (7th Cir. 1951); Allendorf v. Elgin, J. & E. Ry., 8 Ill. 2d 164, 133 N.E.2d 288, 294-95, *cert. denied*, 352 U.S. 833 (1956).

[12] Plourd v. Southern Pac. Transp. Co., 266 Ore. 666, 513 P.2d 1140, 1145 (1973), *appeal after remand*, ___ Ore. ___, 534 P.2d 965 (1975).

The expert is not an advocate.[13] His valuations, whenever discretion is involved, are to be objective best estimates. The decedent is economically evaluated, placed within a statistical category,[14] and treated as an average man within that framework. Advocacy should be left to counsel who will argue and present evidence as to the decedent's "human" qualities of particular skill, industry, likelihood for advancement, frugality, health, and personality.[15] Counsel's role is to aid the jury in weighing the expert's testimony.

B. A Method of Computation

Traditionally, the computation of economic loss due to death consists of this process: An annual earnings figure is determined and multiplied by decedent's work-life or life expectancy.[16] The resultant product may then, depending on the law of the jurisdiction, be adjusted according to expected increases or decreases in wages due to inflation and productivity rates. From this is subtracted an amount representative of what decedent would have expended on himself. Finally, the award is discounted to present value.[17]

The computation method described herein operates in similar fashion, though with minor variations in form. Projected inflation and productivity, based on past experience, are valued and considered. This is

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[13] For a discussion of the economist and public policy, see Pyun, *The Role of the Economist's Testimony in Perspective: An Economist's View*, 39 INS. COUNSEL J. 361 (1972).

[14] Category is used interchangeably with grouping and cohort. These terms refer to a set of statistics tailored for a particular set of characteristics into which a decedent fits. Finding the appropriate statistical grouping is necessary to predict what would have been decedent's likely economic future. Finding an appropriate cohort is particularly helpful when decedent had no established wage earning history. O'Connor & Miller, *The Economist-Statistician: A Source of Expert Guidance in Determining Damages*, 48 NOTRE DAME LAW. 354, 356 (1972).

[15] Personality characteristics have been mentioned as important in a number of Mississippi cases. *E.g.*, Dickey v. Parham, 295 So. 2d 284, 286 (Miss. 1974); Illinois Cent. R.R. v. Gwin, 246 Miss. 67, 72, 149 So. 2d 340, 341 (1963)(decedent young and industrious enough to hold down three jobs); Delta Chevrolet Co. v. Waid, 211 Miss. 256, 268, 51 So. 2d 443, 447 (1951). Decedent's previous health is obviously important since relevant to life expectancy and the use of mortality tables. See part III *C infra*.

[16] Life expectancy is simply the average number of years which an individual can expect to live, determined with reference to the individual's present age. See note 75 *infra*. Work-life expectancy figures show the average number of years which an individual can expect to remain in the work force, determined with reference to the individual's present age. See part III *C infra*.

[17] The computation process described in the text is the traditional method under Mississippi law. In other jurisdictions there may be no requirement that personal expenses be deducted. *See* 22 AM. JUR. 2d *Death* § 153 (1965). Whether an adjustment can be made for projected increases in inflation and productivity is a subject of current dispute and is considered in detail in part II *infra*.

necessary for proper compensation.[18] Fringe benefits and the value of nonmarket services, elements occasionally overlooked, are included.[19] The only variation from traditional computation techniques found in this approach is the use of age-earning characteristics. Instead of multiplying annual income by life or work expectancy, an age-earning adjustment factor has been derived which mathematically represents characteristic increases and decreases in earnings over the lifetime of persons statistically similar to decedent.[20]

Critics of computation methods have argued that a jury should not be burdened with complex calculation schemes, but that a jury's inherent sense of justice should be trusted.[21] Of course, part of the reason for employing an expert is to avoid burdening the jury, aided only by an abstract instruction, with a necessarily complex task.

C. The Pitfalls of Statistics

The decedent is evaluated as of the time of death and placed within a statistical category. He is presumed to remain within that grouping and, in this respect, is treated as average. This necessarily requires reliance on compiled data or statistics. Use of statistics can be misleading and inaccurate unless caution is taken to avoid technical defects.

First, the decedent must actually fall within the statistical category into which he is placed. Minor peculiarities may be cured by other evidence and argument of counsel directed towards altering the weight given the expert's testimony by the jury.[22] When decedent differs substantially from the norm assigned, use of "average man" statistics may be considered misleading and held inadmissible.[23]

Second, data should be selected as narrowly as possible. For example, mortality tables derived from the population as a whole overesti-

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[18] *See* part II *infra*.

[19] See part III *E infra*.

[20] See part III *C infra*.

[21] Moore v. Leininger, 299 Pa. 380, 149 A. 662, 664 (1930). After reviewing the record and making independent calculations, the court in Meehan v. Central R.R., 181 F. Supp. 594 (S.D.N.Y. 1960), concluded that the jury's sense of justice had misjudged a reasonable damage figure by $80,000.

[22] *See* D. Dobbs, *supra* note 5, § 8.5, at 562-63; Immel, *Actuarial Tables and Damage Awards*, 19 Ohio St. L.J. 240, 257-58 (1958). In addition to personality characteristics, counsel may argue or present extensive evidence as to decedent's health, family history, and educational intentions in an attempt to convince the jury that the decedent falls short of or exceeds his statistical expectations. See notes 14 & 15 *supra*.

[23] *E.g.*, Bednar v. United States Lines, Inc., 360 F. Supp. 1313 (N.D. Ohio 1973) (court finding that a reasonable life expectancy is less than the statistical average); Mississippi Cotton Oil Co. v. Smith, 95 Miss. 528, 534, 48 So. 735, 736-37 (1909) (since decedent was asthmatic, error to introduce average life expectancy tables).

mate the life expectancy of a male decedent.[24] Furthermore, since statistics compiled by insurance companies in setting insurance and annuity rates are often based on policy and annuity purchasers, they may overestimate the decedent's life expectancy.[25] In many topic areas, statistics can be refined as to educational level, race, sex, state, and urban or rural residency.[26]

Third, counsel must guard against the use of outdated statistics. The recent Georgia case of *Crowe v. Harrell*[27] presents a flagrant example of this mistake. In *Crowe*, the Carlisle Mortality Tables, compiled in 1814, were used as the measure of life expectancy in a 1970 case.[28]

Finally, error may arise from the computation method used. Annuity tables are often used as a short-form calculating method. Yet if compiled by an insurance company, the tables may reflect overhead costs and profits[29] or be based on stale mortality data.[30] Moreover, while a person's income will normally decline as he grows older,[31] an annuity table does not reflect this fact. A distinction should also be made between an annuity certain and an annuity for life.[32] The amount of the

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[24] The reason is that females tend to live longer than males. In O'Connor v. United States, 269 F.2d 578, 584 (2d Cir. 1959), the court noted the fallacy of using whole population tables.

[25] Immel, *supra* note 22, at 242.

[26] The importance of narrowing the data cannot be overemphasized. For example, in Mississippi, white males age 26 to 27 outlive their black counterparts on the average of 4 years. U.S. DEPARTMENT OF COMMERCE, BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 59 (95th ed. 1974).

[27] 122 Ga. App. 7, 176 S.E.2d 191 (1970).

[28] *Id.* When inaccurate or outdated statistics are used, two results may follow. First, the dollar amount calculated becomes less accurate: "Clearly the calculated economic value of a person—the dollar-amount is no better than the information, data, and assumptions that have gone into its preparation." O'Connor & Miller, *supra* note 14, at 357. Second, the testimony becomes open to attack, though in Crowe v. Harrell, 122 Ga. App. 7, 176 S.E.2d 191 (1970), defense counsel was undoubtedly happy with plaintiff's understated life expectancy. For brief discussions of the history and use of mortality tables, see Immel, *supra* note 22; Hofflander, *Loss of Income Due to Wrongful Death: A Method of Measurement*, 1965 INS. L.J. 92.

[29] Immel, *supra* note 22, at 247-48; Annot., 53 A.L.R.2d 1454 (1957).

[30] Immel, *supra* note 22, at 242-45. The author points out that the field from which the data was gathered controls the average life expectancy computed from the data. Thus, differences arise depending on whether tables used are select or population, select or ultimate, annuity or insurance.

[31] McCaffrey v. Schwartz, 285 Pa. 561, 132 A. 810, 813 (1926), held that present worth tables were inadmissible because they failed to reflect the fact that earning power generally decreases with age. *McCaffrey* was later overruled in Brodie v. Philadelphia Transp. Co., 415 Pa. 296, 203 A.2d 657, 660 (1964), which held that present worth tables or testimony should not be excluded for this reason; the jury, however, could be reminded that with increased age, earnings "in most instances" decline.

[32] After the initial pay-in, an annuity certain guarantees payments for a fixed number of years. An annuity for life is a contract for periodic payments until the annuitant dies

award similarly will be affected if the expert witness omits some element of compensible loss from the computation.[33]

II. The Substantive-Evidentiary Problems

Experience shows that Mississippi courts regularly receive expert testimony on the issue of damages in wrongful death and disability cases. This is true whether the expert serves merely as a calculator or is used to project future earnings in light of probable economic trends.[34] Yet the Mississippi Supreme Court has never approved the use of expert witnesses where the testimony estimates future wages over a long expectancy. Accordingly, in *Mississippi Power & Light Co. v. Shepard*,[35] the court rejected testimony of this calibre as speculative under the circumstances.[36] A majority of American courts probably would agree with this result.[37] In comparison to *Shepard*, the Mississippi court has

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and is therefore based on expected mortality rates. If an annuity certain is used, separate consideration must be given the issue of life expectancy, and the fixed number of payments should correspond to that expectancy. When the expert is asked to testify to the cost of an annuity as the measure of pecuniary loss, counsel should be aware of these differences. For a brief discussion of the theoretical differences between the two approaches, see Comment, *A Misuse of Statistics and Future Damages*, 51 Neb. L. Rev. 663, 669-73 (1972).

[33] One might overlook or consider as *de minimis* the pecuniary value of household and other nonmarket services or fringe benefits. When considered and assigned a value, however, the amount is often substantial. *E.g., In re* United States Steel Corp., 436 F.2d 1256, 1274 (6th Cir. 1970), *cert. denied*, 402 U.S. 987 (1971) (fringe benefits valued between 15 and 40 percent of lost wages); Higginbotham v. Mobile Oil Corp., 360 F. Supp. 1140, 1144, 1147 (W.D. La. 1973) (court assigns value of $50 per month to maintenance and transportation services previously performed by decedent).

[34] The economist-expert serves merely as a calculator when asked to determine decedent's net cash value upon assuming certain figures for life expectancy, annual earnings, personal consumption, and interest rates. For an example of an expert being used in this fashion, see Perry v. Allegheny Airlines, Inc., 489 F.2d 1349 (2d Cir. 1974). When permitted, the economist-expert can serve a second function by including opinions on future economic trends in his calculations. This was evidently done in Dickey v. Parham, 295 So. 2d 284 (Miss. 1974), and unsuccessfully attempted in Mississippi Power & Light Co. v. Shepard, 285 So. 2d 725, 742 (Miss. 1973). See note 10 *supra*.

[35] 285 So. 2d 725, 742 (Miss. 1973) (dictum).

[36] In *Shepard*, a professor of economics had testified, over objection, to the decedent's probable yearly earnings over an expectancy of 38 years. Though stating that under these facts the testimony was inadmissible, the court's language was carefully qualified. "[W]e . . . anticipate that there may be cases where the testimony of an economist could be admissible. We do not believe this is such a case." *Id.* at 742.

Predictions of long term economic trends are often couched in terms of past experience and are, in this sense, extrapolations. The evidence could also be objected to as irrelevant if the expert does not give detailed explanation of the predictive value of past experience.

[37] Several recent federal court cases have considered this question and reflect what seems to be the majority opinion. *E.g.*, Johnson v. Penrod Drilling Co., 510 F.2d 234 (5th

noted that a jury may consider the likelihood of future inflation when assessing damages and, on numerous occasions, has justified jury verdicts by looking, in part, to the decreased purchasing power of the dollar.[38] The jury, thus, may consider what may not be testified to as a matter of evidence. At this time, strong precedential value, perhaps, should not be given the court's brief and equivocal treatment of the issue in *Shepard*. Especially if recent inflationary trends continue,[39] the court probably will be faced with the issue again.

A number of grounds have been advanced to reach the conclusion

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Cir.), *cert. denied*, 96 S. Ct. 69 (1975); Bach v. Penn Cent. Transp. Co., 502 F.2d 1117, 1122 (6th Cir. 1974)(excluded testimony as speculative, but held error to instruct the jury that it could not consider future increases or decreases in the purchasing power of money); Williams v. United States, 435 F.2d 804, 807 (1st Cir. 1970)(applying Rhode Island law); Frankel v. United States, 321 F. Supp. 1331, 1345-46 (E.D. Pa. 1970), *aff'd sub nom.*, Frankel v. Heym, 466 F.2d 1226 (3d Cir. 1972). Sleeman v. Chesapeake & O. Ry., 414 F.2d 305, 307-08 (6th Cir. 1969), is the case most often cited to support the position that testimony predicting future wage increases is too speculative. *Sleeman*, however, could be interpreted as requiring exclusion only when an inadequate evidentiary basis is established. *See* 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 25.11, at 1325 (1956).

Whether evidence predicting future wage increases is admissible should be distinguished from the issue of whether the jury may consider economic trends when reaching a verdict and whether an appellate court can consider the decreased purchasing power of the dollar when reviewing a lower court's verdict. These considerations are usually permissible. *See* Annot., 12 A.L.R.2d 611 (1950).

[38] Kinnard v. Martin, 223 So. 2d 300, 302 (Miss. 1969) ("The jury has a right to consider any change in the purchasing power of money and the cost of living."); Boyd Constr. Co. v. Bilbro, 210 So. 2d 637, 644 (Miss. 1968), *noted in* 43 MISS. L.J. 633 (1972) (recognizing decreased purchasing power of the dollar when comparing verdict to similar cases in the past); Walters v. Gilbert, 248 Miss. 77, 94, 158 So. 2d 43, 51 (1963)(reviewing verdict claimed excessive); Gulf Transp. Co. v. Allen, 209 Miss. 206, 218-19, 46 So. 2d 436, 439 (1950)(reviewing verdict claimed excessive); St. Louis-San Francisco Ry. v. Dyson, 207 Miss. 639, 657-58, 43 So. 2d 95, 99 (1949) ("[W]e do not feel that the verdict is beyond the bounds of reason, particularly when consideration is given to the decreased purchasing power of the dollar."); *see* Annot., 12 A.L.R.2d 611, 646 (1950).

[39] Table IV shows the rise in the consumer price index from 1949 to 1973. See note 83 *supra*. In 1974, the index rose to 147.7, a 10.9 percent increase. The 1975 yearly index has not yet been compiled; however, the available monthly figures are:

Jan.	156.1
Feb.	157.2
Mar.	157.8
Apr.	158.6
May	159.3
June	160.6
July	162.3
Aug.	162.8
Sept.	163.6
Oct.	164.6

BUREAU OF LABOR STATISTICS, MONTHLY LABOR REV. 95 (Dec. 1975).

that expert testimony which projects future wages over a long term is inadmissible when calculated in light of expected inflation and increased real wages.[40] Similar to the Mississippi court's position in *Shepard*, such testimony is often deemed speculative on the grounds that economics is not a sufficiently advanced science.[41] The United States Court of Appeals for the Fifth Circuit, in *Johnson v. Penrod Drilling Co.*,[42] also noted that even should inflation occur, part of the resultant economic loss would be offset by accompanying increased investment rates.[43] A middle ground has been favored by other courts which allow the expert to testify to economic trends but not to offer specific calculations of the effect of these trends.[44] Some courts allow an instruction permitting the jury to consider this element, though not permitting expert testimony.[45] Without reaching the substantive issues,

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[40] Perhaps the most ludicrous reason advanced for exclusion is found in Frankel v. United States, 321 F. Supp. 1331 (E.D. Pa. 1970), *aff'd sub nom.*, Frankel v. Heym, 466 F.2d 1226 (3d Cir. 1973), where the court stated:

> The projected inflationary trend is speculation. Plaintiff has used the decade of the 1960's, one of the more inflationary times in the history of our country, as the basis for a projection of over 50 years. *It is common knowledge that our Government is and has been attempting to control inflation, even to the point of considering wage and price controls.*

Id. at 1346 (emphasis added). Evidently, the court has more faith in the government's economists' ability to "whip" inflation than to predict it. Even if the economists have some success, it should be noted that an inflation rate of zero has never been posed as a realistic goal.

[41] *E.g.*, Bach v. Penn Cent. Transp. Co., 502 F.2d 1117, 1122 (6th Cir. 1974), *quoted in* Riha v. Jasper Blackburn Corp., 516 F.2d 840, 845 (8th Cir. 1975). See cases cited note 37 *supra*. To state that deflation is as likely to occur as inflation is to ignore economic reality.

[42] 510 F.2d 234 (5th Cir.)(en banc), *cert. denied*, 96 S. Ct. 69 (1975).

[43] *Id.* at 236; Frankel v. United States, 321 F. Supp. 1331, 1346 (E.D. Pa. 1970), *aff'd sub nom.*, Frankel v. Heym, 466 F.2d 1226 (3d Cir. 1972). This argument is fallacious for two reasons. First, decedent's survivors will not be able to adjust their investments to take advantage of these changes as they occur. Second, and more importantly, interest rates include a projected inflationary factor. Thus, the amount of the award is being reduced by the same factor, inflation, which should be used to increase the damages. For example, a 6 percent interest rate on a certificate of deposit may consist of a 3 percent earnings factor and a 3 percent inflation factor. Part of the rise in interest rates thus represents the rise in inflation. When the gross award is reduced to present value using a reasonable interest rate it is being reduced partly because of the projected inflationary consideration inherent in the interest rate. There is in essence, then, a double deduction for inflation when courts disallow an addition to the award for the expected rise in consumer prices. One solution to this problem would be to use a low discount rate representative of the earnings factor only.

[44] Johnson v. Serra, 521 F.2d 1289, 1296 (8th Cir. 1975)(applying Minnesota law); Bach v. Penn Cent. Transp. Co., 502 F.2d 1117, 1122 (6th Cir. 1974); Tenore v. Nu Car Carriers, Inc., 67 N.J. 466, 341 A.2d 613, 617, 622 (N.J. 1975).

[45] Riha v. Jasper Blackburn Corp., 516 F.2d 840, 843-45 (8th Cir. 1975)(applying Nebraska law); Bach v. Penn Cent. Transp. Co., 502 F.2d 1117, 1122 (6th Cir. 1974). This

the testimony may be held inadmissible when the expert fails to establish an adequate basis.[46]

Probably as a response to this country's recent bout with inflation, numerous courts[47] now allow expert testimony on the issue of probable future wage increases. This position seems logically sound. When testimony of future inflationary trends is excluded, the court is treating the decedent "as if [he] had contracted to work his remaining work life expectancy at the same salary he was earning on his date of death without any pay raises contemplated."[48] Damages as compensation for lost future wages obviously cannot be computed with certainty,[49] nor need they be. Only a reasonable prediction of what most probably would have occured is possible. Typical of those courts now allowing economic trend testimony was the Montanta Supreme Court's response to a defendant who argued that inflation should not be considered when arriving at an award compensating for lost future wages:

> Here, defendant would have this Court take the position of an ostrich with his head in the sand. Economic reality requires us to consider not only what plaintiff is to receive in theory, but in fact.[50]

Summarizing the logic of several courts, the argument favoring admissibility is as follows: Inflation and consequent rising wages are an "economic reality" to the extent of reasonable probability.[51] Courts

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perhaps best characterizes the Mississippi court's present position. *Compare* Mississippi Power & Light Co. v. Shepard, 285 So. 2d 725, 742 (Miss. 1973)(dictum), *with* Kinnard v. Martin, 223 So. 2d 300, 302 (Miss. 1969).

[46] Hoffman v. Sterling Drug, Inc., 485 F.2d 132, 144 (3d Cir. 1973); Magill v. Westinghouse Elec. Corp., 464 F.2d 294, 300 (3d Cir. 1972)(even though applicable Pennsylvania law would allow consideration of probable future economic trends, expert's testimony inadmissible when justified only by common usage in the insurance industry); *In re* United States Steel Corp., 436 F.2d 1256, 1272-76 (6th Cir. 1970), *cert. denied*, 402 U.S. 987 (1971); Scott v. James Gibbons Co., 192 Md. 319, 64 A.2d 117, 123 (1949) ("[T]he answer did not call for a computation from annuity tables, admitted in evidence, but for the opinion of a witness as to the cost of an annuity, based on tables not in evidence, on the expense of insurance companies and on an assumed rate of interest which was for the jury themselves to decide.").

[47] Rhode Island provides by statute that economic trends may be considered when computing wrongful death awards. R.I. GEN. LAWS ANN. § 10-7-1.1 (Supp. 1975). For other courts admitting expert testimony of this nature, see notes 50 through 60 and accompanying text *infra*.

[48] Demos, *Measure of Damages—Wrongful Death*, 60 ILL. BAR J. 518, 521 (1972).

[49] While there is no certainty to the future, this is an inadequate ground for the exclusion of an educated guess. Mortality tables obviously do not purport to state exactly when a particular individual will die, but they do provide a reasonable estimate, fair to plaintiff and defendant, while reducing the jury's scope of conjecture. Similar logic should be applied to the issue of consideration of future economic trends.

[50] Resner v. Northern Pac. Ry., 161 Mont. 177, 505 P.2d 86, 91 (1973).

[51] Riha v. Jasper Blackburn Corp., 516 F.2d 840, 845 (8th Cir. 1975) (no expert

which refuse to allow consideration of future trends are making the opposite and less likely prediction: that there will be no inflation during the remainder of the decedent's life expectancy.[52] Though economic predictions are somewhat speculative, they are no more so than other forms of evidence commonly admitted, such as mortality tables and discount rates.[53] Thus, the economist's testimony is of value and should be considered and weighed by the jury.[54] More importantly, the plaintiff's position must be considered. To base a future-compensating award on present wage levels relegates beneficiaries to fixed income status. If inflation occurs, as is reasonable to assume, plaintiff will not have been compensated for the loss,[55] since decedent would not have worked at fixed wages throughout his work-life.[56] This problem is not adequately solved by courts which allow the jury to consider future wage increases while excluding expert testimony. A jury unaided by the expert's perspective may tend to evaluate future trends based on present condi-

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testimony allowed); Bach v. Penn Cent. Transp. Co., 502 F.2d 1117, 1122 (6th Cir. 1974); Resner v. Northern Pac. Ry., 161 Mont. 177, 505 P.2d 86, 91 (1973).

[52] United States v. English, 521 F.2d 63, 75 (9th Cir. 1975)(applying California law); O'Connor & Miller, *supra* note 14, at 360.

[53] United States v. English, 521 F.2d 63, 75 (9th Cir. 1975) ("While predicting future inflationary trends, or extrapolating from present ones, may be speculative, so are most predictions courts make about future incomes, expenses . . . ."); Tenore v. Nu Car Carriers, Inc., 67 N.J. 466, 341 A.2d 613, 620 (1975), *quoting* Plourd v. Southern Pac. Transp. Co., 266 Ore. 666, 513 P.2d 1140, 1146 (1973), *appeal after remand*, ____ Ore. ____, 534 P.2d 965 (1975)("In our opinion, however, it is no more speculative to assume that wage rates . . . will continue to increase . . . than it is to assume that the interest discount rate will remain stationary during the same . . . period."); Turietta v. Wyche, 54 N.M. 5, 212 P.2d 1041, 1047-48 (1949).

[54] Burlington N., Inc. v. Boxberger, No. 73-2173 (9th Cir., November 26, 1975); Huddel v. Levin, 395 F. Supp. 64, 82 (D.N.J. 1975) ("[E]xpert testimony, based upon special knowledge or experience, may be introduced as an aid to the jury's determination."); Krohmer v. Dahl, 145 Mont. 491, 402 P.2d 979, 981 (1965) ("It appears to us that in this particular case the element of conjecture is reduced significantly by the admission of expert testimony as to the possible future earnings of the decedent. It also appears that this expert testimony is not only the best evidence, but the only evidence available in this case to prove future earnings."); Tenore v. Nu Car Carriers, Inc., 67 N.J. 466, 341 A.2d 613, 617 (1975) ("[P]laintiff's evidence would have reduced the degree of jury speculation by providing some guidelines for the practical application of inflation to the determination of the survivors' damages.").

[55] In Bach v. Penn Cent. Transp. Co., 502 F.2d 1117, 1122 (6th Cir. 1974), the court noted that prohibiting jurors from considering the probability of inflation would result in "grievous under-compensation." Expert testimony, however, was not admitted. *See* Tenore v. Nu Car Carriers, Inc., 67 N.J. 466, 341 A.2d 613, 618 (1975). See part III *D infra* and Appendix I for a look at how grievously undercompensated a plaintiff would be if moderate inflation continues while no adjustment is made in damage calculations. Decreased purchasing power is the consequence of ignoring the increases due to inflation and productivity shown in Appendix I.

[56] Beaulieu v. Elliot, 434 P.2d 665, 671 (Alas. 1967); Demos, *supra* note 48, at 520.

tions alone.[57] Permitting the testimony does not invite wild speculation. The witness must qualify as an expert, and the basis for his testimony must be adequate. No authorization exists to pull inflation rates out of the air.[58] Furthermore, counsel can cure any alleged prejudice caused by the expert's projections either by asking the witness to assume different values for computation purposes or by use of another expert, as is commonly done in other subject areas.[59] The jury can also be reminded that the witness's opinions are advisory and not binding.[60]

III. The Expert's Value Judgments and Approach to Damage Calculations

A. Establishing the Statistical Cohort

As previously mentioned, computing the pecuniary value of life requires the use of statistics. The decedent must be "plugged in" to a computation scheme which treats him as a statistical entity. Certain noncontroverted facts, involving no value judgments by the expert, must be determined. The expert must know decedent's (1) date of birth; (2) date of death; (3) race; (4) level of education; (5) sex; (6) number and age of dependents; and (7) life expectancy.

In order to make this article more helpful, wrongful death damages have been computed based on a "John Doe" model. Doe was a white male born on August 13, 1948, and met a tortious death at the age of 26 on September 13, 1974. He had 6 years of education and was earning $5,445 per year at the time of his death. Survivors include his wife Mary, age 23, and two children, Joe, age 4, and Jane, age 2.

B. The Base, Annual Earning Figure

Although future earnings or lost earning capacity is the theoretical

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[57] Scruggs v. Chesapeake & O. Ry., 320 F. Supp. 1248, 1251 (W.D.Va. 1970)(As the jury would probably consider inflationary trends anyway, expert testimony may make conclusions more correct.); Krohmer v. Dahl, 145 Mont. 491, 402 P.2d 979, 981 (1965) (Expert testimony adds "perspective" and reduces conjecture by the jury.); Tenore v. Nu Car Carriers, Inc., 67 N.J. 466, 341 A.2d 613, 619-21 (1975) (admitted to reduce the possibility of conjecture).

[58] United States v. English, 521 F.2d 63, 75 (9th Cir. 1975).

[59] Tenore v. Nu Car Carriers, Inc., 67 N.J. 466, 341 A.2d 613, 621 (1975); Plourd v. Southern Pac. Transp. Co., 266 Ore. 666, 513 P.2d 1140, 1147 (1973), *appeal after remand*, ___ Ore. ___, 534 P.2d 965 (1975).

[60] Dickey v. Parham, 295 So. 2d 284, 286 (Miss. 1974), *citing* Rayner v. Lindsey, 243 Miss. 824, 138 So. 2d 902 (1962); Tenore v. Nu Car Carriers, Inc., 67 N.J. 466, 341 A.2d 613, 621 (1975); Plourd v. Southern Pac. Transp. Co., 266 Ore. 666, 513 P.2d 1140, 1147 (1973), *appeal after remand*, ___ Ore. ___, 534 P.2d 965 (1975); O'Connor & Miller, *supra* note 14, at 357.

object of compensation in death and permanent disability cases,[61] past earnings usually serve as the guide in determining the damage award.[62] Absent extraordinary circumstances, previous earnings are considered an accurate indication of decedent's earning capacity.[63] Determining a fair figure for annual earnings is critical since this amount will serve as the basis for subsequent calculations. The decision is not difficult when the decedent had an established and consistent pattern of earnings. The expert must decide only which yearly income or average income figure best characterizes recent earnings. No single calculation practice will be fair in every case. Income over the 12-month period prior to death may

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[61] 2 F. HARPER & F. JAMES, *supra* note 37, at § 15.8. Characteristically, courts define the question in terms of earning capacity only when the injured party had established no previous consistent earnings history. Morrison v. State, 516 P.2d 402 (Alas. 1973)(recovery for earning capacity of 13-year-old girl); Germ v. City & County of San Francisco, 99 Cal. 2d 404, 222 P.2d 122, 135-36 (1st Dist. Ct. App. 1950)(inebriate incapable of finding and holding employment can recover for lost earning capacity); Hildyard v. Western Fasteners, Inc., 33 Colo. App. 396, 522 P.2d 596, 601 (1974) (recovery for lost earning capacity in personal injury action even though there is no actual loss of income); Florida Greyhound Lines, Inc. v. Jones, 60 So. 2d 396, 398 (Fla. 1952)(recovery allowed for lost earning capacity of unemployed housewife since she might be forced to work at some time in the future); LeMay v. Minneapolis St. Ry., 245 Minn. 192, 71 N.W.2d 826 (1955) (permanently disabled housewife can recover for lost earning capacity even though not in nor planning to return to labor force).

For a discussion of whether "future" earnings are the proper object of recovery under Mississippi's wrongful death act, see Luckett & Thomas, *supra* note 6, at 637-40. In Dickey v. Parham, 295 So. 2d 284 (Miss. 1974), the court expressed the measure of damages for pecuniary loss as "[t]he sum the deceased *might* have received as the present net value of his own life expectancy." (footnote omitted; emphasis added).

[62] No one can be sure what contributions a decedent would have made in the future . . . . Nevertheless, past earnings and contributions constitute evidence to be considered in deciding what probable future contributions would have been made.

D. DOBBS, *supra* note 5, § 8.5, at 562. Past earnings are evidently considered to be demonstrated earning capacity. When reviewing an allegedly excessive jury verdict the Mississippi Supreme Court initially considers the amount decedent had been earning. *E.g.*, Oden Constr. Co. v. McPhail, 228 So. 2d 586, 590 (Miss. 1969); Illinois Cent. R.R. v. Ragan, 252 Miss. 335, 341, 173 So. 2d 433, 435 (1965).

[63] Southern Coach Lines, Inc. v. Wilson, 31 Tenn. App. 240, 214 S.W.2d 55, 57 (1948)(personal injury action; permanent disability; court stated that loss in earnings furnishes practically an accurate measure of loss in earning capacity); *see* Annot., 81 A.L.R.2d 733 (1962)(evidence of earnings over objection of remoteness in time). In states where recovery is for pecuniary loss to survivors instead of net cash value, the amount awarded will often be small when decedent had established no earnings history. *E.g.*, Seaboard Coast Line R.R. v. Robinson, 263 So. 2d 626 (2d Dist. Ct. App. Fla. 1972)(nominal damages recoverable for death of 64-year-old widow without business skills or income other than social security); Claar v. Culpepper, 212 Va. 771, 188 S.E.2d 86 (1972)(award for pecuniary loss reversed since deceased mother had no earnings and the record failed to support award for lost services).

be appropriate if the decedent was young and income had been steadily rising. A look only at the previous year's income, however, would misrepresent the income of a person who had been ill or on strike for a substantial portion of that time. Use of income averages over the past 3 to 5 years seems preferable.[64] Sound judgment dictates that if the expert is allowed to pose an annual earnings figure, he should do so objectively. The credibility of his entire testimony depends on how well his valuation withstands cross-examination.

In our model, the annual earnings figure of $5,445 appears as column 3 in Appendix I. As a base figure, the figure remains a constant amount. The sum at the bottom of column 3 ($245,025) represents gross lifetime earnings if we assume Doe would have worked at constant wages over his life expectancy.

C. *Age Earning Characteristics*

Gross lifetime earnings are computed most often by multiplying annual income by either (1) life expectancy, (2) a typical life factor (number of years prior to retirement at age 65 plus lost social security payments until death), or (3) work-life expectancy.[65] Each method has its defects. Life expectancy tables are misleading. Persons seldom continue employment until death, and these estimates ignore the fact that income characteristically decreases during a person's later years.[66] The so-called typical life is actually a hoped-for life and does not correspond

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[64] *See, e.g., In re* United States Steel Corp., 436 F.2d 1256, 1269, 1274-75 (6th Cir. 1970), *cert. denied*, 402 U.S. 987 (1971) (annual income base should be the higher of last year's pay or average of last 4 years absent abnormal circumstances); Porello v. United States, 153 F.2d 605, 608 (2d Cir. 1946)(should look at average instead of previous year alone), *aff'd in part and rev'd in part sub nom.*, American Stevedores, Inc. v. Porello, 330 U.S. 446 (1947); Turcol v. Jenkins, 49 Del. 596, 122 A.2d 224, 225 (1956)(average of past several years); Hirsch v. Kendrick, 43 So. 2d 692, 695 (Ct. App. La. 1950) (appropriate to look at average earnings in personal injury action when plaintiff worked on commission).

The question sometimes arises whether the earnings evaluated occurred at a point too remote in time. Ihrie v. Anthony, 205 Md. 296, 107 A.2d 104, 108 (Ct. App. 1954) (earnings 7 to 8 years ago not considered too remote); *see* Annot., 81 A.L.R.2d 733 (1962).

[65] For a discussion of the Mississippi law distinguishing between work and life expectancies, see Luckett & Thomas, *supra* note 6, at 635-37. The conflicting language in Jeffreys v. Clark, 251 Miss. 129, 146, 168 So. 2d 662, 669 (1964), and Rayborn v. Freeman, 209 So. 2d 193, 196 (Miss. 1968), cannot be reconciled.

[66] *See In re* Petroleum Tankers Corp., 204 F. Supp. 727, 732 (S.D.N.Y. 1960)(court considers the nature of employment when discussing whether decedent would have worked until end of life expectancy); Fontenot v. National Transfer Co., 99 So. 2d 795, 809 (Ct. App. La. 1957) (decedent could not have been expected to work past retirement age because of nature of work); McCaffrey v. Schwartz, 285 Pa. 561, 132 A. 810, 813 (1926) (noting natural decline in earning capacity as individual gets older), *overruled* as to exclusion of present value tables in Brodie v. Philadelphia Transp. Co., 415 Pa. 296, 203 A.2d 657, 660 (1964).

to collected data. Use of work-life expectancies is theoretically more sound though not adequately refined to reflect differences in job characteristics.[67] Work-life tables, however, do reflect consequences due to economic conditions as well as voluntary and involuntary retirement.[68] Life or work-life expectancy tables are readily admitted into evidence in Mississippi[69] and in courts throughout the United States.[70] Such statistics must, of course, be relevant and are inadmissible if inappropriate tables are used[71] or because of decedent's prior health.[72] These statistics are advisory only[73] and are not essential when sufficient evidence of expectancy is otherwise available.[74]

Table I shows life expectancies for white males in the United States.[75] Mr. Doe, who died at age 26, would normally have expected to live 45 years, until age 71. Rather than drawing upon retirement age or work-life expectancy figures, use of age-earning characteristics derived

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[67] D. DOBBS, *supra* note 5, at 572 & n.15; Luckett & Thomas, *supra* note 6, at 637. Work-life statistics would be more reliable if particularized as to type of employment (farm, industrial, professional) and geographic section of the country. When such statistics are available they should be used in preference to more generalized statistics. Perhaps the best source of work-life expectancy tables presently available is Fullerton, *A New Type of Working Life Table for Men*, MONTHLY LABOR REVIEW 21 (July, 1972); Fullerton, *A Table of Expected Working Life for Men*, MONTHLY LABOR REVIEW 49-55 (June, 1971).

[68] *See* tables compiled by Fullerton, *supra* note 67.

[69] Mortality tables have been admissible in Mississippi at least since 1914. Mississippi Cent. R.R. v. Robinson, 106 Miss. 896, 64 So. 838 (1914).

[70] Sauter v. New York Cent. & H.R.R., 66 N.Y. 50 (1876), may have been the first American case in which the jury was allowed to consider a mortality table. The United States Supreme Court first approved the use of life and annuity tables in 1886. Vicksburg & M.R.R. v. Putnam, 118 U.S. 545, 554 (1886). It is likely that no state excludes this form of evidence today. *See* Annot., 50 A.L.R.2d 421 (1956) (annotation refers to permanent injuries, but same principles apply). For a history of expectancy tables, *see* Hofflander, *Loss of Income Due to Wrongful Death: A Method of Measurement*, 1965 INS. L.J. 92; Immel, *supra* note 22, at 240-42.

[71] A mortality table for the general population (males and females) would be inappropriate for use when estimating the probable life expectancy of a male. O'Connor v. United States, 269 F.2d 578, 584 (2d Cir. 1959).

[72] See note 23 *supra*.

[73] Mealey v. Slaton Mach. Sales, Inc., 508 F.2d 87, 92 (5th Cir. 1975) (weight given tables is for the jury); Metcalfe v. Atchison, T. & S.F. Ry., 491 F.2d 892, 899 (10th Cir. 1974) (by implication, work expectancy just one more factor to be considered); Dickey v. Parham, 295 So. 2d 284, 286 (Miss. 1974) (testimony of expert which included mortality data advisory only); *see* D. DOBBS, *supra* note 5, § 8.7, at 572-73.

[74] Francis v. Sauve, 222 Cal. App. 2d 102, 34 Cal. Rptr. 754, 764 (1st Dist. Ct. App. 1963); Bromfield v. Seybolt Motors, Inc., 113 N.H. 525, 309 A.2d 914, 916 (1973); Gulf, M. & O.R.R. v. White, 219 Miss. 342, 349, 68 So. 2d 458, 460 (1953); Rhoden v. Booth, 344 S.W.2d 481, 486 (Tex. Civ. App. 1961) (dictum); Immel, *supra* note 22, at 244-45.

from census data is more accurate.[76] This data, which is particularized as to educational level, race, sex, state, urban or rural residency, farm or nonfarm residency, gives average earnings of different age groups for persons within the statistical grouping.[77] Data plotted on table II covers the statistical group corresponding to our model.[78] The curve, which depicts the characteristic pattern of earning increases and declines over a lifetime for that particular group, graphically shows John's probable future earnings pattern in present dollars, had he lived. Since John was not earning an "average" wage for his statistical grouping at the time

[75] *TABLE I. Expectation of life for a white United States male*

Age	Expectation Of Life In Years	Age	Expectation Of Life In Years
10	60.0	36	35.7
11	59.0	37	34.8
12	58.0	38	33.9
13	57.0	39	33.0
14	56.1	40	32.1
15	55.1	41	31.2
16	54.2	42	30.3
17	53.2	43	29.4
18	52.3	44	28.6
19	51.4	45	27.7
20	50.5	46	26.9
21	49.6	47	26.0
22	48.7	48	25.2
23	47.8	49	24.4
24	46.9	50	23.6
25	46.0	51	22.8
**26	45.0	52	22.0
27	44.1	53	21.2
28	43.2	54	20.5
29	42.3	55	19.7
30	41.3	56	19.0
31	40.4	57	18.3
32	39.5	58	17.6
33	38.5	59	16.9
34	37.6	60	16.2
35	36.7	61	15.6

Source: UNITED STATES NATIONAL CENTER FOR HEALTH STATISTICS, VITAL STATISTICS OF THE UNITED STATES (1971), reprinted in U.S. DEPT. OF COMMERCE, BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES (95th ed. 1974).

[76] These statistics are derived specifically from data gathered in Mississippi. 1 UNITED STATES BUREAU OF THE CENSUS, CENSUS OF THE POPULATION 653 (1970). Similar statistics for other states are available.

[77] *Id.*

of his death he cannot be plugged into the graph as presented.[79] A curve of this shape must, then, be mathematically constructed beginning at the point at which John is found at the time of his death. John's curve would be a ghost image of the curve appearing at table II, only slightly higher on the scale. The separate issues of retirement age and work-life expectancy are included in the age earning data. Earnings from all sources are included over the entire expectancy.

For computation purposes, it is a simple matter to calculate the geometric mean of this data.[80] At column 4 in Appendix I this has been done. This series of age earning factors represents, numerically, the curve found on table II. Age earnings, column 5, are computed by multiplying annual earnings, horizontally, by the age earning factor. The sum at the bottom of column 5 is John's probable gross dollar earnings over his normal lifetime. While the sum of column 5 is less than the sum of column 3, this will not be true in all cases. The particular age earnings

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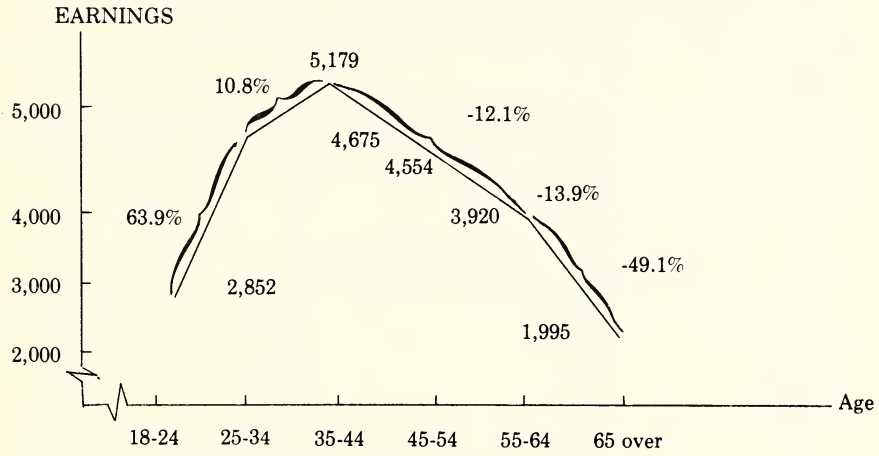
[78] *TABLE II. Age-earnings relation for a white Mississippi male completing between 5 to 7 years of elementary school*



Source: U.S. BUREAU OF THE CENSUS, CENSUS OF POPULATION: 1970, DETAILED CHARACTERISTICS, FINAL REPORT PC (1) Mississippi, 653.

[79] The graph depicts average incomes for white Mississippi males with 5 to 7 years of education at a particular time, 1970. Interpreted narrowly, the data shows only that persons within a certain age group, of a certain educational level, have a particular income average. We interpret the data to show that a person within this statistical grouping can expect his wages to rise and fall over his lifetime in a pattern similar to the curve plotted on table II, *supra* note 78, regardless of his present income level.

[80] The formula for calculation of the geometric mean is: $r = \sqrt{P_n/P_o} - 1$, where r = the rate of increase, P_n = the value at the end of the period, P_o = the value at the beginning of the period, n = the number of time periods.

characteristics of the group considered and whether decedent was killed on the lower or upper part of his earnings curve affect this result.[81]

D. *Productivity and Inflation*

Real wages are the amounts of goods and services which money received as wages will buy. Money wages are the number of dollars received. Two factors cause money wages to increase: increases in the value of the worker via experience and learning (productivity) and cost of living increases (roughly inflation). Wage increases which result from cost of living adjustments are money increases only. Productivity increases cause both real and money wages to rise. Table III shows United States private nonfarm output per man hour (productivity) from 1949 through 1973.[82] Table IV lists the United States index of consumer prices (inflation) from 1949 through 1973.[83] To translate this data into work-

[81] The curve, for example, for professional persons would not exhibit as rapid a decline in earnings in the later years, since their economic productivity is not as significantly related to their physical condition. Were John Doe killed at age 35 to 44, the curve would show a decline for the remainder of his expectancy and the sum of column 5 would be even smaller in proportion to column 3. The contrary would be true if Doe were killed at age 18 to 24.

[82] Thus output or productivity is the individual's ability to produce goods and services. Economically, wages rise due to productivity when the worker's skill, training, and motivation enable him to produce more goods per hour than previously. Table III depicts this trend in numerical terms with 1967 used as the base year. From 1967 to 1973, productivity rose 15.2 points or 15.2 percent.

TABLE III. Index of private nonfarm output per man hour 1949-1973 (1967=100)

Year	Output	Year	Output
1949	61.1	1962	86.4
1950	65.0	1963	89.1
1951	66.3	1964	92.4
1952	66.9	1965	95.1
1953	68.9	1966	98.4
1954	70.5	1967	100.0
1955	73.6	1968	102.9
1956	73.2	1969	102.7
1957	74.8	1970	103.4
1958	76.7	1971	107.7
1959	79.3	1972	112.2
1960	80.3	1973	115.2
1961	82.7		

Source: UNITED STATES DEPARTMENT OF LABOR, BUREAU OF LABOR STATISTICS, 1975 HANDBOOK OF LABOR STATISTICS 187, table 85.

[83] The term "inflation" technically refers to the increase in money supply. It is commonly used with reference to the rising cost of goods, and is so used here. Table IV shows

able mathematic terms a year base or time span must be selected and the geometric mean calculated. The effect of this choice is displayed in table V.[84] For example, the consumer price index trend ranges from 2.5 percent to 5.0 percent depending on whether a 25- or 5-year period is examined.[85] The productivity increase rate demonstrates greater stability, varying only between 2.3 percent and 2.6 percent. The expert is obligated to make an impartial value judgment as to the time span that must be studied in order to determine the economic trend by extrapolation. The substantive-evidentiary problems involved when an expert witness seeks to testify to future economic trends have been previously discussed.[86] If objected to, the expert may not be able to advance opinions on this subject matter, nor include them in his calculations. For this reason, the expert should be prepared to testify with or without these considerations.

this increase in prices in numerical terms with 1967 as the base year. From 1967 to 1973 the index rose 33.1 points or 33.1 percent.

TABLE IV. Index of consumer prices 1949-1973 (1967=100)

Year	CPI	Year	CPI
1949	71.4	1962	90.6
1950	72.1	1963	91.7
1951	77.8	1964	92.9
1952	79.5	1965	94.5
1953	80.1	1966	97.2
1954	80.5	1967	100.0
1955	80.2	1968	104.2
1956	81.4	1969	109.8
1957	84.3	1970	116.3
1958	86.6	1971	121.3
1959	87.3	1972	125.3
1960	88.7	1973	133.1
1961	89.6		

Source: UNITED STATES DEPARTMENT OF LABOR, BUREAU OF LABOR STATISTICS, 1975 HANDBOOK OF LABOR STATISTICS 311, table 123.

[84] *TABLE V. Average annual rates of increase for productivity and inflation for various base years*

Base Year	Average Annual Rate of Increase: Productivity	Consumer Prices
1949 (25 year period)	2.6%	2.5%
1964 (10 year period)	2.6%	3.8%
1969 (5 year period)	2.3%	5.0%

[85] The price index and productivity increase percentages are calculated by use of the geometric mean formula. See note 80 *supra*.

[86] See part II *supra*.

For our model, a conservative 25-year base has been used. Age-earning-adjusted annual earnings will thus be further adjusted by a 2.6 percent annual increase in productivity and a 2.5 percent annual cost of living increase.[87] The effect of these adjustments can be seen in Appendix I. Column 6 adjusts gross age-earnings for the productivity increase and column 7 adds the inflation factor. Age earnings for a particular year are increased horizontally from left to right. In year 10, for example, Doe would most likely have earned $5,955 at present dollars. Money wages would have been increased to $7,697 (column 6) due to increased productivity and to $9,853 (column 7) when inflation is taken into account. This increase is in money wages. The increases in money wages resulting from productivity increases are the only real wage increases. The sums at the bottom of columns 6 and 7 show the cumulative effect of productivity and inflation increases on lifetime earnings. The impact of even moderate inflation and productivity increases can readily be seen. Comparing the sum of column 5 to the sum of column 7 gives a rough idea of the decreased value of the wrongful death award over a lifetime if economic trends are ignored.

E. Fringe Benefits and Nonmarket Services

No pecuniary values are assumed for fringe benefits and nonmarket services, listed as columns 8 and 9 on Appendix I. These elements, however, should not be ignored. Depending on the particular circumstances, each can amount to significant cash figures.[88] Fringe benefits consist of such items as pensions and employer-paid insurance contracts. Benefits which are contingent may be included or excluded from the calculation depending on how soon decedent's interest would have vested.[89] Items which accrued to the benefit of decedent only should not be considered a fringe benefit for calculation purposes, although these same items can be considered in reduction of the amount allotted to personal expenses.[90]

In Mississippi, as in most other jurisdictions, plaintiff can recover

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[87] See note 84 *supra*.

[88] For example, in *In re* United States Steel Corp., 436 F.2d 1256, 1274 & n.8 (6th Cir. 1970), the court valued fringe benefits from 15 percent to 40 percent of lost wages. *See* note 91 and accompanying text *infra*.

[89] A surprising outcome can be found in Raines v. New York Cent. R.R., 51 Ill. 2d 428, 283 N.E.2d 230, 233-34, *cert. denied*, 409 U.S. 983 (1972), where the court allowed an instruction as to the injured plaintiff's lost pension benefits, even though plaintiff had been employed for only 9 days at the time of the accident, and pension benefits would not have vested until 10 years of employment.

[90] In Law v. Sea Drilling Corp., 510 F.2d 242, 251 (5th Cir. 1975), the court supported an allegedly low valuation for personal consumption expenditures, noting that decedent had been supplied an automobile by his employer.

for the value of nonmarket services performed by decedent.[91] These usually consist of home repairs, domestic, and other services. Of course, when decedent had not been employed outside the home, as is often true when a wife or child is killed, the value of nonmarket services represents the measure of the pecuniary loss element of a net cash value theory of recovery.[92]

F. Personal Consumption Expenses

Since recovery is for the "net present cash value of what decedent would have earned during his life expectancy, and not the gross amount,"[93] a sum must be deducted from gross income for that which decedent would have expended on himself during his lifetime. This deduction must be made under Mississippi law.[94] Determining personal expenses with any degree of accuracy, however, is difficult. Such expenses are seldom recorded. Thus wide variations in valuation appear in the cases.[95]

In the absence of specific facts of personal expenditure habits the

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[91] *E.g.*, Boyd Constr. Co. v. Bilbro, 210 So. 2d 637 (Miss. 1968), *noted in* 43 MISS. L. J. 633 (1972); Gulf Transp. Co. v. Allen, 209 Miss. 206, 218-19, 46 So. 2d 436, 439 (1950); 22 AM. JUR. 2d *Damages* § 133 (1965). For examples of valuation of nonmarket services, see Higginbotham v. Mobile Oil Corp., 360 F. Supp. 1140, 1144, 1147 (M.D. La. 1973) (home maintenance and transportation services valued at $50 per month); Curry v. United States, 338 F. Supp. 1219, 1223-24 (N.D. Cal. 1971) (seaman's services valued at $500 per year when at home).

[92] Other elements of recovery, society, companionship, pain and suffering to decedent, are still compensible. Dickey v. Parham, 295 So. 2d 284, 285 (Miss. 1974). See the court's treatment of the pecuniary value of a housewife's services in Gulf Transp. Co. v. Allen, 209 Miss. 206, 218-19, 46 So. 2d 436, 439-40 (1950).

[93] Louisville & N.R.R. v. Garnett, 129 Miss. 795, 808, 93 So. 241, 243 (1922). In *Garnett* the decedent was unmarried and living alone. His personal consumption expenditure would thus have been high.

[94] *Id.*; New Deemer Mfg. Co. v. Alexander, 122 Miss. 859, 897, 85 So. 104, 107 (1920).

[95] Federal cases are more instructive on this point since the courts often engage in detailed calculations. United States v. English, 521 F.2d 63, 72 & n.8 (9th Cir. 1975) (30 percent of gross income deducted for personal expenses and taxes under California law); Law v. Sea Drilling Corp., 510 F.2d 242, 251 (5th Cir. 1975) (approved deduction of 15 percent of gross income noting that decedent had been provided an automobile by employer); Metcalfe v. Atchinson, T. & S.F. Ry., 491 F.2d 892, 899 (10th Cir. 1974) (40 percent figure approved for decedent survived by wife and one child); O'Connor v. United States, 269 F.2d 578, 583 (2d Cir. 1959) (decedent survived by wife and child assumed to have expended one-third of gross income on personal consumption); Higginbotham v. Mobil Oil Corp., 360 F. Supp. 1140, 1144 (W.D. La. 1973) (15 percent deduction proper since decedent worked offshore with free room and board 50 percent of the time and was given generous expense account). The problem is thoroughly discussed in Meehan v. Central Ry., 181 F. Supp. 594 (S.D.N.Y. 1960). *See* Hamilton & Patterson, *supra* note 4, at 134-37. The amount of the deduction is a function of decedent's personal habits and the size the family.

expert should testify with reference to the norm, based on reputable statistics, and leave to counsel the task of shading the case in light of personal characteristics. Excellent guidelines are provided by Earl F. Chiet's study which lists average personal expenditures in percentage-of-income form, based on family size. At table VI this data shows that John Doe, married with two children, could be expected to spend 22 percent of family income on himself annually.[96] The percentage increases as each child reaches majority.[97] When son, Joe, reaches majority, Doe's personal consumption expenditure will increase to 26 percent and when daughter, Jane, is no longer a dependent, the expenditure component will increase to 30 percent. Chiet's study differs from what seems to be the assumption of several courts: that personal expenses are in direct proportion to the numerical makeup of the family unit.[98] The amounts listed in column 10 of Appendix I show the computation for personal consumption expenditures and the total below, the amount which would have been expended over a lifetime for this factor.

G. Reduction to Present Value

Since a given sum of money in hand is worth more than the equivalent sum to be paid in the future,[99] in order to award proper compensation, a lump sum judgment must be reduced to present worth. This is accomplished by means of discounting which is, in essence, the converse of compounding interest. Ideally, an amount must be determined which,

[96] *TABLE VI. Consumption expenditures of Family Head, by size of family*

Family Size at Time Family Head is Killed	Family Head's Consumption Expenditures Total Family Income
Two adults	.30
Two adults, 1 minor dependent child	.26
Two adults, 2 minor dependent children	.22
Two adults, 3 minor dependent children	.20
Two adults, 4 minor dependent children	.18

Source: E. CHEIT, INJURY AND RECOVERY IN THE COURSE OF EMPLOYMENT 78 (1961).

[97] Age 18 is used as the end of minority for purposes of this article. Age 21 may often be more appropriate. Another alternative would be reliance upon the particular state's mandatory child support laws. *See, e.g.*, MISS. CODE ANN. § 97-5-3 (1972)(obligation to support children under age 16 enforced by criminal penalty).

[98] *E.g.*, O'Connor v. United States, 269 F.2d 578, 593 (2d Cir. 1959); Montellier v. United States, 202 F. Supp. 384 (E.D.N.Y. 1962), *aff'd*, 315 F.2d 180 (2d Cir. 1963); Fontenot v. National Transfer Co., 99 So. 2d 795 (Ct. App. La. 1957). *But cf.* United States v. English, 521 F.2d 63, 72 (9th Cir. 1975).

[99] Chesapeake & O. Ry. v. Kelley, 241 U.S. 485, 489 (1916).

if invested at a reasonable interest rate and assuming interest earnings and intermittent withdrawals from capital, will yield over decedent's life expectancy an amount equal to his net lifetime earnings.[100]

The requirement that a lump award as compensation for future earnings be discounted has been accepted throughout the United States.[101] Since discounting is advantageous to defendant, he will probably insist that the instruction be given, though it is unclear in Mississippi whether he or plaintiff is obligated to do so.[102] The instruction, however, is proper and the Mississippi court has often engaged in its own discounting calculation when testing the amount of a jury award.[103] Counsel should fully explain the rationale for discounting. As has been noted, the jury may consider the requirement unfair.[104] The discount rate is a reasonable, projected, long-term interest rate which a person with no special financial skill can "safely" achieve.[105] Economic risk

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[100] Appendix III exemplifies this principle. Given interest earnings and withdrawal from capital, the lump sum award is completely expended in the last year of decedent's expectancy.

[101] Federal courts in federal question cases are controlled by Chesapeake & O. Ry. v. Kelley, 241 U.S. 485 (1916), in which the Supreme Court held that compensation for future losses must be reduced to present value. The United States Court of Appeals for the Third Circuit now requires this rule's implementation by district courts within its jurisdiction in diversity cases even though reduction to present worth is not mandatory under the applicable state law, Haddigan v. Harkins, 441 F.2d 844, 853 (3d Cir. 1970), or is permissible only, Russel v. City of Wildwood, 428 F.2d 1176, 1182 (3d Cir. 1970). *See* 25A C.J.S. *Death* § 101, at 907 (1966); 22 AM. JUR. 2d *Death* § 124, at 693 (1965); Annot., 77 A.L.R. 1439 (1932). *But see* Pierce v. New York Cent. Ry., 304 F. Supp. 44 (W.D. Mich. 1969); Leavitt v. Gillaspie, 443 P.2d 61 (Alas. 1968) (not required that award be reduced to present value since offset by inflation); *cf.* Yodice v. Koninklijke Nederlandsche Stoom. Maat., 443 F.2d 76, 79 (2d Cir. 1971) (noting that courts may have to reconsider the rule if inflation continues at its present pace).

[102] In Louisville & N. Ry. v. Garnett, 129 Miss. 795, 806-08, 93 So. 241, 242-43 (1922), the court found error in plaintiff's instruction which failed to advise the jury that personal expenses must be deducted. It would seem, then, that plaintiff commits error if failing to request an instruction calling for a reduction to present value. Our court, however, has never specifically so held. *See* D. DOBBS, *supra* note 5, at § 8.7.

[103] In Dickey v. Parham, 295 So. 2d 284 (Miss. 1974), the court reviewed without comment the substance of an expert's testimony which included a reduction to present value; *accord*, Louisville & N. Ry. v. Garnett, 129 Miss. 795, 806, 93 So. 241, 242-43 (1922); Hines v. Green, 125 Miss. 476, 498, 87 So. 649, 653 (1921).

[104] Luckett & Thomas, *supra* note 6, at 648.

[105] Chesapeake & O. Ry. v. Kelley, 241 U.S. 485, 490 (1916); Meehan v. Central R.R., 181 F. Supp. 594, 609-10 (S.D.N.Y. 1960); Annot., 105 A.L.R. 234 (1936); 22 AM. JUR. 2d *Death* § 125, at 694 (1965). Since the jury returns a general verdict, counsel suggests reasonable rates to the jury through witnesses. On review, the court will look to evidence of this rate when making its calculations. Dickey v. Parham, 295 So. 2d 284, 286 (Miss. 1974) (noting that testimony is advisory only); Meehan v. Central R.R., 181 F. Supp. 594 (S.D.N.Y. 1960). Where no testimony is presented as to reasonable interest rates, the court may assume the legal rate for review purposes. Hines v. Green, 125 Miss. 476, 498, 87 So. 649, 653 (1921).

should fall on the tortfeasor. When the computation is performed a difference of a single percentage point can be substantial.[106] For this reason, the issue of a reasonable interest rate is hotly contested.

The process of computing present lifetime earnings is often abbreviated at the trial level by testimony from an actuary as to the cost of an annuity. Testimony in this form may contain defects not easily recognized. An annuity table combines both interest and mortality rate assumptions. Thus, if based on inaccurate or inappropriate statistics, use of the annuity table is inappropriate.[107] In addition, annuity tables prepared by commercial enterprises which reflect overhead costs and profits should not be admitted.[108] The sum of column 11 on Appendix I, $482,742, shows John Doe's net lifetime earnings after consideration of all the factors appearing to the left of that column. Figures appearing along column 11 represent "net"[109] earnings for each year in decedent's expected life duration. At column 12 these amounts are reduced to

[106] Luckett & Thomas, *supra* note 6, at 648. The figures below show *inter alia* the substantial difference in result caused by assumption of a 6 percent rather than 6.76 percent discount rate. Without considering taxes there is a 13.4 percent difference ($15,353). When taxes are included there is an 11.9 percent ($12,674) difference.

TABLE VII. The Magnitude of Changes in the Economist's Data

	Without Taxes		With Taxes	
Item Changed	Present Value of Adjusted Net Earnings	Percent Change From $114,912	Present Value of Adjusted Net Earnings	Percent Change From $106,727
If earnings were $10,890 not $5,445*	$229,825	100.0	$197,044	84.6
If inflation is 5% not 2.5%*	180,664	57.2	156,492	46.6
If discount rate is 6%, not 6.76%*	130,265	13.4	119,401	11.9
If black not white	110,190	(4.1)	100,957	(5.4)
If no children	112,350	(2.2)	105,085	(1.5)
If born 10 years earlier	78,267	(31.9)	72,248	(32.3)
If college graduate	161,043	40.1	143,616	34.6

*Indicates judgment factors by the economist.

[107] See note 30 and accompanying text *supra*.

[108] See note 29 and accompanying text *supra*. D. DOBBS, *supra* note 5, at 573.

[109] Net as used here refers to gross lifetime earnings less decedent's personal consumption.

present value using an interest rate of 6.76 percent.[110] Each figure within column 12 is the amount which must be presently paid to yield the figure to its immediate left at a future date. For example, when John Doe would have been age 40, his net income would have been $8,929. Paid today, $3,574 invested at a 6.76 percent annual interest rate would yield $8,929 in the year 1988. The sum of column 12, $114,912, is the amount which should be presently paid in order to yield proper compensation for the pecuniary loss due to Doe's death. Income tax consequences have not been considered in this computation.

IV. Income Tax Consequences

Under section 104(a)(2) of the Internal Revenue Code of 1954, damages awarded as compensation for personal injury or wrongful death are not includable in the gross income of the recipient.[111] Any interest earned on the award, however, is taxed at ordinary income rates.[112] Wrongful death damages, described to this point, thus invite a two-tier tax problem. First, the principal or amount awarded escapes taxation. This is an economic windfall to the beneficiaries who are overcompensated to the extent of the tax which would have been paid on the award had decedent earned it while living. The tax escaped is money which would not have been available to the decedent or beneficiaries for normal consumption. Economically speaking, decedent is worth more to the beneficiaries dead than alive. Plaintiffs are compensated beyond their pecuniary loss, and defendant is required to pay for this excess. Second, because the award is paid in lump-sum fashion, instead of yearly, the beneficiaries' tax bill will be altered. This results from the fact that interest is earned at a different rate than the yearly cash amounts which normally would have been available.

Courts in this country have received the issue of decreased tax liability even less warmly than the question of future inflation;[113] the

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[110] The figure 6.76 percent was the rate on long-term government securities for the week ending January 3, 1975. Federal Reserve Bank of St. Louis, *U.S. Financial Data* 7 (January 3, 1975). It has been selected for use in this example somewhat arbitrarily, although a person could be able to earn this rate of return without particular financial expertise.

[111] Int. Rev. Code of 1954, § 104(a)(2); *see* Anderson v. United Air Lines, 183 F. Supp. 97 (S.D. Cal. 1960).

[112] Int. Rev. Code of 1954, § 61(a)(4).

[113] This attitude is typified by courts which, despite the complications, have held that future economic trends may be considered while excluding the tax question from consideration. *E.g.*, Huddell v. Levin, 395 F. Supp. 64, 84-91 (D.N.J. 1975); Plant v. Simmons Co., 321 F. Supp. 735, 739-40 (D. Md. 1970); Scruggs v. Chesapeake & O. Ry., 320 F. Supp. 1248, 1251 (W.D. Va. 1970); Plourd v. Southern Pac. Transp. Co., 266 Ore. 666, 513 P.2d 1140, 1147-48 (1973), *appeal after remand*, ___ Ore. ___, 534 P.2d 965 (1975). Parentheti-

result being that income tax consequences are usually excluded from consideration by the trier of fact.[114] Because of the multitudinous "types" of cases, the positions taken by the courts evade classification. This is especially true in the federal courts.[115] In both state and federal courts, however, decisions can be placed into three broad categories: (1)

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cally, it should be noted that less than 1 month after litigation terminated in *Huddell,* the New Jersey Supreme Court held in Tenore v. Nu Car Carriers, Inc., 67 N.J. 466, 341 A.2d 613, 623-29 (1975), that a defendant must be afforded the opportunity to present evidence on the issue of decreased income tax liability.

[114] Annot., 63 A.L.R.2d 1393 (1959). States allowing the jury to consider tax consequences now include: United States v. English, 521 F.2d 63 (9th Cir. 1975) (applying California law—approved trial court's deduction for decreased taxes); Turcotte v. Ford Motor Co., 494 F.2d 173, 185 (1st Cir. 1974)(applying Rhode Island law); Floyd v. Fruit Indus., Inc., 144 Conn. 659, 136 A.2d 918, 925-26(1957); Dempsey v. Thompson, 363 Mo. 339, 251 S.W.2d 42, 44-46 (1952); Tenore v. Nu Car Carriers, Inc., 67 N.J. 466, 341 A.2d 613, 623-29 (1975).

[115] In addition to the federal law-state law distinction, one court has implicitly suggested that federal court rulings may depend on whether a jury is used. *See* Huddel v. Levin, 395 F. Supp. 64, 85-86 (D.N.J. 1975). *But see In re* Marina Mercante Nicaraguense, 364 F.2d 118, 125 (2d Cir. 1966), *cert. denied sub nom.,* Marina Mercante Nicaraguense v. McAllister Bros., Inc., 385 U.S. 1005 (1967)(court applies *McWeeney* rule irrespective of whether there is a jury trial). A distinction has also been made between personal injury and death cases. *See* Brooks v. United States, 273 F. Supp. 619, 629-30 (D.S.C. 1967)(The court reasoned that future tax liability is less conjectural in death cases since changes in the number of dependents are precluded.). *But see* Huddel v. Levin, 395 F. Supp. 64, 85 n.22 (D.N.J. 1975)(court finds no conceptual distinction); Burns, *A Compensation Award For Personal Injury or Wrongful Death Is Tax-Exempt: Should We Tell the Jury?* 14 DEPAUL L. REV. 320, 326 (1965). D. Dobbs, *supra* note 5, at 576, states that Cox v. Northwest Airlines, Inc., 379 F.2d 839 (7th Cir. 1967), *cert. denied,* 389 U.S. 1044 (1968), and O'Connor v. United States, 269 F.2d 578 (2d Cir. 1959), may be explicable due to the death-personal injury distinction.

In federal law cases, the circuit courts' holdings are as follows: Burlington N., Inc., v. Boxberger, No. 73-2173 (9th Cir., Nov. 26, 1975) (evidence should be admitted); Johnson v. Penrod Drilling Co., 510 F.2d 234 (5th Cir.), *cert. denied,* 96 S. Ct. 69 (1975)(tax consequences should not be considered); Domeracki v. Humble Oil & Ref. Co., 443 F.2d 1245, 1249-51 (3d Cir.), *cert. denied,* 404 U.S. 883 (1971) (jury should be instructed that nothing should be added or subtracted from the award due to tax considerations); *In re* United States Steel Corp., 436 F.2d 1256, 1273-74 (6th Cir. 1970), *cert. denied,* 402 U.S. 987 (1971)(following *McWeeney,* unless amount involved is substantial, tax consequences will not be considered); Cox v. Northwest Airlines, Inc., 379 F.2d 893, 896 (7th Cir. 1967) (following *McWeeney*); Boston & M.R.R. v. Talbert, 360 F.2d 286, 291 (1st Cir. 1966) (income tax consequences should not be considered); United States v. Sommers, 351 F.2d 354 (10th Cir. 1965)(question of income tax deduction should be left to sound discretion of judge); Gardner v. National Bulk Carriers, Inc., 221 F. Supp. 243 (E.D. Va. 1963), *aff'd,* 333 F.2d 676 (4th Cir. 1964)(tax consequences should not be considered); McWeeney v. New York, N.H. & H.R.R., 282 F.2d 34, 35-39 (2d Cir.), *cert. denied,* 364 U.S. 870 (1960)(no deduction need be made in lower and middle income levels); Chicago & N.W. Ry. v. Curl, 178 F.2d 497, 502 (8th Cir. 1949)(evidence of income taxes should be excluded).

No consideration can be given to income tax consequences, and the jury is not to be instructed concerning taxes.[116] (2) No consideration can be given income tax consequences and the jury may be so instructed. Failure to instruct creates a danger that the jury will pad the award to give plaintiff an after-tax compensation.[117] (3) Income tax consequences must or may be considered in computing the wrongful death recovery.[118] Reasons advanced by courts which preclude the question from consideration include: (1) the question of future tax liability is too speculative;[119] (2) introduction of evidence as to tax consequences tends to confuse the jury because it adds a complex element to an already complex calculation;[120] (3) permitting the evidence would turn every death or injury case into a battle of experts contesting the future federal income tax structure;[121] (4) reducing the award would frustrate congressional intent to

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[116] Johnson v. Penrod Drilling Co., 510 F.2d 234, 236-37 (5th Cir.), *cert. denied*, 96 S. Ct. 69 (1975); Scruggs v. Chesapeake & O. Ry., 320 F. Supp. 1248, 1251 (W.D. Va. 1970); Raines v. New York Cent. R.R., 51 Ill. 2d 428, 283 N.E.2d 230, 232, *cert. denied*, 409 U.S. 983 (1972); Spencer v. Martin K. Erby Constr. Co., 186 Kan. 345, 350-54, 350 P.2d 22-25 (1960); Louisville & N.R.R. v. Mattingly, 318 S.W.2d 844, 848 (Ky. 1958), *appeal after remand*, 339 S.W.2d 155 (Ky. 1960).

[117] Courts applying this rule reason that it has two advantages: (1) Plaintiff does not receive a double windfall which would occur if the jury erroneously increased the award to compensate for incorrectly assumed tax liability, and (2) it avoids the confusion which would result if the court instructed the jury to reduce the award due to its nontaxation. *E.g.*, McWeeney v. New York, N.H. & H.R.R., 282 F.2d 34, 39 (2d Cir.), *cert. denied*, 364 U.S. 870 (1960); Artherley v. MacDonald, Young & Nelson, Inc., 142 Cal. App. 2d 575, 298 P.2d 700, 709 (1st Dist. Ct. App. 1956) (proper to give but not error to refuse the instruction); Dempsey v. Thompson, 363 Mo. 339, 251 S.W.2d 42, 45 (1952)(court must give instruction when requested).

[118] See cases cited note 114 *supra*.

[119] This reason has been advanced by practically all courts which refused to consider tax consequences. *E.g.*, Stokes v. United States, 144 F.2d 82, 87 (2d Cir. 1944); Scruggs v. Chesapeake & O. Ry., 320 F. Supp. 1248, 1251 (W.D. Va. 1970); Hall v. Chicago & N.W. Ry., 5 Ill. 2d 135, 125 N.E.2d 77 (1955); Plourd v. Southern Pac. Transp. Co., 266 Ore. 666, 313 P.2d 1140, 1148 (1973), *appeal after remand*, ___ Ore. ___, 534 P.2d 965 (1975). Professor Nordstrom has aptly refuted this rationale. Nordstrom, *Income Taxes and Personal Injury Awards*, 19 Ohio St. L.J. 212, 226-27 (1958).

[120] This has been commonly used as a basis for excluding evidence on tax consequences. The argument is valid when the issue is whether the jury should compute the tax saving and deduct this amount from damages, Johnson v. Penrod Drilling Co., 510 F.2d 234, 236-37 (5th Cir.), *cert. denied*, 96 S. Ct. 69 (1975); Domeracki v. Humble Oil & Ref. Co., 443 F.2d 1245, 1250 (3d Cir.), *cert. denied*, 404 U.S. 883 (1971); Huddel v. Levin, 395 F. Supp. 64, 89 (D.N.J. 1975), but inapplicable to the question of whether a cautionary instruction should be given advising the jury that damages are not to be decreased or increased to compensate for nontaxation. Nordstrom, *supra* note 119, at 219-20; Burns, *supra* note 115, at 330-31.

[121] Johnson v. Penrod Drilling Co., 510 F.2d 234, 236-37 (5th Cir.), *cert. denied*, 96 S. Ct. 69 (1975) (by implication); Frankel v. United States, 321 F. Supp. 1331, 1348-49 (E.D. Pa. 1970), *aff'd*, 466 F.2d 1226 (3d Cir. 1972). Professor Nordstrom answered that the

extend tax free compensation;[122] (5) plaintiff's tax benefit is a private matter between plaintiff and the government which does not alter the plaintiff-defendant relation;[123] (6) any theoretical overcompensation awarded plaintiff is counterbalanced by inflation, attorney's fees, and the fact that interest earned on the award is taxed.[124] The soundness of these reasons has been adequately discussed in the literature and will not be repeated here.[125] It may be observed, however, that reduced to meaningful terms, judicial refusal to consider the tax issue is based upon the conclusion that the burdens which would be placed on both court and jury outweigh the injustice done the defendant.[126]

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proper response is not exclusion of this testimony but alteration of the methods employed to deal with the problem. Nordstrom, *supra* note 119, at 228-29.

[122] Chicago & N.W. Ry. v. Curl, 178 F.2d 497, 502 (8th Cir. 1950); Huddel v. Levin, 395 F. Supp. 64, 87-89 (D.N.J. 1975); Hall v. Chicago & N.W. Ry., 5 Ill. 2d 135, 125 N.E.2d 77 (1955). This argument has been challenged by writers who note that Congress, at least initially, believed that tort damages were beyond the reach of the sixteenth amendment. Nordstrom, *supra* note 119, at 222-23; 8 TULSA L.J. 242, 243-44 (1972). In *Huddel*, *supra* at 87-89, the court answered this argument by pointing to the fact that congressional intent can be found in reenactment of the exemption when the constitutional question was no longer considered valid.

[123] Atlantic Coast Line R.R. v. Brown, 93 Ga. App. 805, 92 S.E.2d 874 (1956); Hall v. Chicago & N.W. Ry., 5 Ill. 2d 135, 125 N.E.2d 77 (1955); Missouri-Kan-Tex R.R. v. McFerrin, 291 S.W.2d 931 (Tex. Ct. App. 1956).

Unlike the collateral source rule, from which this argument was derived, plaintiff has not paid for this collateral compensation as would be the case with insurance. Indeed, the tax benefit is a true windfall.

[124] *E.g.*, McWeeney v. New York, N.H. & H.R.R., 282 F.2d 34, 37-38 (2d Cir.), *cert. denied*, 364 U.S. 870 (1960) (benefit received by nontaxation offset by inflation, attorney's fees, and the fact that interest is taxed); Scruggs v. Chesapeake & O. Ry., 320 F. Supp. 1248, 1251 (W.D. Va. 1970)(points out that interest earned on award is taxable in discussion of complexity of calculation); Jennings v. United States, 178 F. Supp. 516, 532 (D. Md. 1959), *rev'd on other grounds*, 291 F.2d 880 (4th Cir. 1961) (should not reduce award partly because plaintiff is denied full recovery due to attorney's fees). This reasoning is uniformly unsatisfactory. The tort litigant must pay his own attorney's fees. To offset a reduction that should benefit the defendant with this argument is to charge defendant with plaintiff's attorney cost. To state that taxes must be paid on the interest earned avoids the question. What is at issue is the nontaxation of the lump sum. Summarily refusing to consider inflation by offsetting is unfair to the plaintiff, since the effect of inflation is much more substantial. Compare the increase due to inflation in the example at Appendix I, with projected tax liability at Appendix II.

[125] *See generally* D. DOBBS, *supra* note 5, § 8.8; Burns, *supra* note 115; Nordstrom, *supra* note 119; 56 MINN. L. REV. 503 (1972); 33 OHIO ST. L.J. 972 (1972); 8 TULSA L.J. 242 (1972).

[126] The leading case of McWeeney v. New York, N.H. & H.R.R., 282 F.2d 34 (2d Cir.), *cert. denied*, 364 U.S. 870 (1960), is based on this balancing analysis. In *McWeeney* the court held that when the plaintiff falls into the lower and middle income ranges, tax consequences should not be considered. Only when plaintiff's tax bill would have been comparatively large should the court open the door to this issue. In subsequent decisions the Second Circuit began the difficult task of applying the *McWeeney* rule. Thus, in

While the Mississippi Supreme Court has never ruled on the issue, reduction for the tax benefit is consistent with our state's rule that the "net" present cash value be recovered in wrongful death actions.[127] Tax liability is functionally similar to personal expenses which have been deductible under Mississippi case law since *Hines v. Green*.[128] In fact, deduction for taxes is more consistent with a "net" rule than are personal expenses, since they benefit neither the survivor nor the beneficiaries. Though similar in form conceptually, the tax saving cannot be calculated for deduction purposes in the same fashion as are personal expenses.

In Appendix I, John Doe's net lifetime earnings are calculated as $482,742 (column 11). Reduced to present value at a 6.76 percent discount rate, proper compensation would be present payment of $114,912. If an adjustment is made for income taxes, the present value of John's lifetime earnings must be decreased by the present value of the tax paid. This process consists of two steps.

Appendix II is identical to Appendix I except that column 8 has been introduced to show income taxes that would have been levied on the series of incomes in column 7. Column 7 is identical to column 7 in Appendix I and represents a prediction of what Doe's gross yearly money wages would have been had he lived. Assuming 1974 income tax rates, the $750 per year exemptions for dependents while appropriate (The exemptions for Doe's two children are lost when each reaches majority; Doe and his wife are given an additional exemption when they reach age 65.), and use of the standard deduction, column 8 in Appendix II thus shows appropriate yearly income taxes and a lifetime sum of $93,088. This amount is what would have been expended on income taxes over the decedent's projected life. This amount is subtracted in column 12 and reduced to present value at column 13. Consideration of taxes thus reduces the net present value of Doe's lifetime earnings to $97,181, differing from the calculation at Appendix I by $17,731.

An award of $97,181, however, would not adequately compensate John's survivors, because it is paid in a lump sum and because interest

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LeRoy v. Sabena Belgian World Airlines, 344 F.2d 266, 276 (2d Cir.), *cert. denied*, 382 U.S. 878 (1965), the tax savings of a geologist in the $16,000 to $25,000 range were held to be deductible, while in *In re* Marina Mercante Nicaraguense, 364 F.2d 118, 126 (2d Cir. 1966), *cert. denied sub nom.*, Marina Mercante Nicaraguense v. McAllister Bros., Inc., 385 U.S. 1005 (1967), incomes from $9,300 to $12,000 were deemed to be in the lower and middle ranges and taxes were not considered.

[127] See note 6 and accompanying text *supra*.

[128] 125 Miss. 476, 498, 87 So. 649, 653 (1921); see Louisville & N.R.R. v. Garnett, 129 Miss. 795, 806-08, 93 So. 241, 242-43 (1972). The factor of personal consumption was mentioned earlier in New Deemer Mfg. Co. v. Alexander, 122 Miss. 859, 896, 85 So. 104, 107 (1920), but the court's meaning was unclear.

income is taxable. A look at the income tax picture faced by Mary Doe is necessary. Column 12 at table Appendix II shows the amounts which must be available to Mrs. Doe yearly if she is to be adequately compensated. An award must be determined which, considering interest earned and the tax on that interest, will result in Mrs. Doe having available for consumption the amounts in column 12. At Appendix III the tax implications are more accurately represented. The figures appropriate to 1975 will be discussed as an example. Calculations over the lifetime continue in similar fashion. If Mrs. Doe is awarded $106,727 (column 3), she will earn $7,215 interest (column 4) in 1975. Tax on this amount would be $600 (column 5), assuming two dependent children and the standard deduction.[129] The present value of $600 in 1975 is $562 (column 6).[130] Column 7 restates the $4,239 obtained from column 12 at Appendix II and is the amount Mrs. Doe must have for consumption purposes, the present values of which are listed in column 8. Since her tax bill will be $600 in 1975, she needs $4,239 (column 7) plus $600 (column 5) or $4,839 in 1975. The present value of this amount is $4,533 (column 10); note the damage award is not paying for Mrs. Doe's tax but is allowing her to "pay" taxes in an amount which John would have paid as shown in Appendix II. The sum of column 10 ($106,727) at Appendix III is the amount which must be presently paid such that the decedent's survivors will be left in the same financial condition that they occupied before the death. When compared to the taxless computation in Appendix I, defendant would be overcharged $8,185 or 7.1 percent if the income tax rates are not considered.

Conclusion

The computation of wrongful death damages is, unfortunately, complex. The attorney, however, does not have to be able to make these computations. The method need only be understood well enough to enable him to evaluate and attack the expert's statistical and methodological weaknesses. Hopefully, the preceding discussion adequately prepares the attorney for this role and should serve counsel's attempts to discredit or exclude expert testimony which considers future economic trends and income tax liability.

In contrast, the sample calculations implicitly argue for the admissibility of future economic trend and income tax testimony. Examination of these figures shows that the amounts involved are substantial,[131]

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[129] Amounts shown in column 5 reflect changes due to exemptions lost when each child reaches majority.

[130] These figures were calculated as if payment was made in 1974.

[131] *See* note 106 *supra*.

though conservative projections of, for example, inflation have been assumed. Compensation for future loss belies its purpose if computation of this loss is confined to present earning rates. Furthermore, if the jury is allowed to consider inflation and productivity increases when determining plaintiffs' damages, it seems illogical that expert testimony, which would display the precise effects of these long-term valuations, should be excluded. The issue of income tax liability stands on similar footing. Though it is speculative and complex to present for the jury's consideration, certainly it is better to arrive at a reasonable approximation of the income tax benefit than to ignore its existence. The principle involved is accuracy. While the future cannot be predicted, assuming statistical probabilities, a complete calculation is more accurate than one which brushes over economic realities. If inclusive computation tables—one which a jury could use to assume various valuations and derive a specific dollar amount—are developed, the jury can perform the calculation independently. If not, the legislature should consider allowing the court to compute the element of pecuniary value.

APPENDIX I

HUMAN LIFE VALUE CALCULATIONS (AS OF JAN. 10, 1975)
(EXCLUDING TAXES)

			Earnings Adjustment For:			
LN	Year Ended Sept.	Annual Earnings	Age-Earnings Factor	Age-Earnings	Product. 2,600%	Inflat. 2.500%
(1)	(2)	(3)	(4)	(5)	(6)	(7)
1	1975	5445	1.0114	5507	5650	5792
2	1976	5445	1.0114	5570	5864	6161
3	1977	5445	1.0114	5634	6085	6553
4	1978	5445	1.0114	5698	6315	6970
5	1979	5445	1.0114	5764	6553	7414
6	1980	5445	1.0114	5830	6800	7886
7	1981	5445	1.0114	5896	7057	8388
8	1982	5445	1.0114	5964	7323	8922
9	1983	5445	1.0114	6032	7599	9491
10	1984	5445	.9872	5955	7697	9853
11	1985	5445	.9872	5879	7797	10230
12	1986	5445	.9872	5804	7897	10621
13	1987	5445	.9872	5730	7999	11026
14	1988	5445	.9872	5656	8102	11448
15	1989	5445	.9872	5584	8206	11885
16	1990	5445	.9872	5513	8312	12339
17	1991	5445	.9872	5442	8419	12811
18	1992	5445	.9872	5373	8528	13300
19	1993	5445	.9872	5304	8636	13808
20	1994	5445	.9851	5225	8730	14305
21	1995	5445	.9851	5147	8824	14820
22	1996	5445	.9851	5071	8919	15354
23	1997	5445	.9851	4995	9014	15907
24	1998	5445	.9851	4921	9111	16479
25	1999	5445	.9851	4848	9209	17073
26	2000	5445	.9851	4776	9308	17687
27	2001	5445	.9851	4705	9408	18324
28	2002	5445	.9851	4635	9509	18984
29	2003	5445	.9851	4566	9611	19667
30	2004	5445	.9347	4267	9216	19332
31	2005	5445	.9347	3989	8838	19002
32	2006	5445	.9347	3728	8476	18679
33	2007	5445	.9347	3485	8128	18360
34	2008	5445	.9347	3257	7795	18047
35	2009	5445	.9347	3044	7475	17740
36	2010	5445	.9347	2845	7169	17438
37	2011	5445	.9347	2660	6875	17141
38	2012	5445	.9347	2486	6593	16848
39	2013	5445	1.0000	2486	6764	17719
40	2014	5445	1.0000	2486	6940	18634
41	2015	5445	1.0000	2486	7120	19596
42	2016	5445	1.0000	2486	7306	20608
43	2017	5445	1.0000	2486	7495	21673
44	2018	5445	1.0000	2486	7690	22792
45	2019	5445	1.0000	2486	7890	23969
TOTALS		245025		204183	354253	661074

APPENDIX I—Continued

Adjustment For:			Adj Net Earnings	Present Value of	
Fringe Benefits (8)	Nonmarket Services (9)	Decedent Consumption (10)	For (7)+(8)+(9)−(10) (Current Year Dollars) (11)	Adj Net Earnings 6.760% (12)	Age
0	0	1274	4518	4232	27
0	0	1355	4805	4216	28
0	0	1442	5111	4200	29
0	0	1533	5437	4185	30
0	0	1631	5783	4170	31
0	0	1735	6151	4154	32
0	0	1845	6543	4139	33
0	0	1963	6959	4124	34
0	0	2088	7403	4109	35
0	0	2168	7685	3996	36
0	0	2251	7979	3886	37
0	0	2337	8284	3779	38
0	0	2426	8601	3675	39
0	0	2518	8929	3574	40
0	0	3090	8795	3297	41
0	0	3208	9131	3206	42
0	0	3843	8967	2949	43
0	0	3990	9310	2868	44
0	0	4142	9666	2789	45
0	0	4292	10014	2707	46
0	0	4446	10374	2627	47
0	0	4606	10748	2549	48
0	0	4772	11135	2473	49
0	0	4944	11535	2400	50
0	0	5122	11951	2329	51
0	0	5306	12381	2260	52
0	0	5497	12827	2193	53
0	0	5695	13288	2128	54
0	0	5900	13767	2065	55
0	0	5800	13532	1902	56
0	0	5701	13302	1751	57
0	0	5604	13075	1612	58
0	0	5508	12852	1484	59
0	0	5414	12633	1367	60
0	0	5322	12418	1258	61
0	0	5231	12206	1159	62
0	0	5142	11998	1067	63
0	0	5055	11794	982	64
0	0	4607	13112	1023	65
0	0	4845	13789	1007	66
0	0	5095	14501	992	67
0	0	4534	16074	1030	68
0	0	4768	16905	1015	69
0	0	5014	17778	1000	70
0	0	5273	18696	985	71
0	0	178331	482742	114912	

APPENDIX II

HUMAN LIFE VALUE CALCULATIONS (AS OF JAN. 10, 1975)
(INCLUDING TAXES)

LN	Year Ended Sept.	Annual Earnings	Age-Earnings Factor	Age-Earnings	Earnings Adjusted For: Product. 2.600%	Inflat. 2.500%
(1)	(2)	(3)	(4)	(5)	(6)	(7)
1	1975	5445	1.0114	5507	5650	5792
2	1976	5445	1.0114	5570	5864	6161
3	1977	5445	1.0114	5634	6085	6553
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5	1979	5445	1.0114	5764	6553	7414
6	1980	5445	1.0114	5830	6800	7886
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9	1983	5445	1.0114	6032	7599	9491
10	1984	5445	.9872	5955	7697	9853
11	1985	5445	.9872	5879	7797	10230
12	1986	5445	.9872	5804	7897	10621
13	1987	5445	.9872	5730	7999	11026
14	1988	5445	.9872	5656	8102	11448
15	1989	5445	.9872	5584	8206	11885
16	1990	5445	.9872	5513	8312	12339
17	1991	5445	.9872	5442	8419	12811
18	1992	5445	.9872	5373	8528	13300
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21	1995	5445	.9851	5147	8824	14820
22	1996	5445	.9851	5071	8919	15354
23	1997	5445	.9851	4995	9014	15907
24	1998	5445	.9851	4921	9111	16479
25	1999	5445	.9851	4848	9209	17073
26	2000	5445	.9851	4776	9308	17687
27	2001	5445	.9851	4705	9408	18324
28	2002	5445	.9851	4635	9509	18984
29	2003	5445	.9851	4566	9611	19667
30	2004	5445	.9347	4267	9216	19332
31	2005	5445	.9347	3989	8838	19002
32	2006	5445	.9347	3728	8476	18679
33	2007	5445	.9347	3485	8128	18360
34	2008	5445	.9347	3257	7795	18047
35	2009	5445	.9347	3044	7475	17740
36	2010	5445	.9347	2845	7169	17438
37	2011	5445	.9347	2660	6875	17141
38	2012	5445	.9347	2486	6593	16848
39	2013	5445	1.0000	2486	6764	17719
40	2014	5445	1.0000	2486	6940	18634
41	2015	5445	1.0000	2486	7120	19596
42	2016	5445	1.0000	2486	7306	20608
43	2017	5445	1.0000	2486	7495	21673
44	2018	5445	1.0000	2486	7690	22792
45	2019	5445	1.0000	2486	7890	23969
TOTALS		245025		204183	354253	661074

APPENDIX II—(Continued)

Tax on Adj Inc (8)	Adjustment For: Fringe Benefits (9)	Nonmarket Services (10)	Dec. Cons (11)	Adj Net Earnings For (7)+(9)+(10)−(8)−(11) (Current Dollars) (12)	Present Value Adj Net Earn 6.760% (13)	Age
278	0	0	1274	4239	3971	27
328	0	0	1355	4477	3928	28
381	0	0	1442	4730	3887	29
438	0	0	1533	4999	3848	30
501	0	0	1631	5282	3808	31
570	0	0	1735	5582	3770	32
645	0	0	1845	5898	3731	33
731	0	0	1963	6228	3691	34
823	0	0	2088	6580	3652	35
881	0	0	2168	6804	3537	36
942	0	0	2251	7037	3427	37
1005	0	0	2337	7279	3320	38
1071	0	0	2426	7530	3217	39
1139	0	0	2518	7790	3118	40
1352	0	0	3090	7443	2790	41
1432	0	0	3208	7699	2703	42
1686	0	0	3843	7282	2395	43
1777	0	0	3990	7533	2321	44
1888	0	0	4142	7778	2244	45
1997	0	0	4292	8017	2167	46
2110	0	0	4446	8264	2092	47
2228	0	0	4606	8520	2020	48
2362	0	0	4772	8773	1949	49
2505	0	0	4944	9031	1879	50
2653	0	0	5122	9298	1812	51
2807	0	0	5306	9574	1748	52
2966	0	0	5497	9861	1686	53
3131	0	0	5695	10158	1627	54
3307	0	0	5900	10460	1569	55
3218	0	0	5800	10314	1449	56
3136	0	0	5701	10166	1338	57
3055	0	0	5604	10020	1235	58
2975	0	0	5508	9877	1141	59
2897	0	0	5414	9736	1053	60
2820	0	0	5322	9598	973	61
2744	0	0	5231	9462	898	62
2670	0	0	5142	9328	829	63
2597	0	0	5055	9197	766	64
2627	0	0	4607	10485	818	65
2856	0	0	4845	10933	799	66
3097	0	0	5095	11405	780	67
3162	0	0	4534	12912	828	68
3448	0	0	4768	13456	808	69
3762	0	0	5014	14016	788	70
4091	0	0	5273	14605	769	71
93088	0	0	178331	389654	97181	

APPENDIX III

HUMAN LIFE VALUE CALCULATIONS
(INCLUDING TAXES ON PLAINTIFF)

LN (1)	Year Ended Sept. (2)	Principal (3)	Annual Interest 6.760% (4)	Tax on Interest Income (5)	Present Value of Tax 6.760% (6)
1	1975	106727	7215	600	562
2	1976	109103	7375	624	547
3	1977	111377	7529	648	533
4	1978	113528	7674	672	517
5	1979	115532	7810	694	500
6	1980	117366	7934	714	482
7	1981	119005	8045	732	463
8	1982	120420	8140	747	443
9	1983	121584	8219	760	422
10	1984	122464	8279	769	400
11	1985	123169	8326	777	378
12	1986	123681	8361	783	357
13	1987	123980	8381	786	336
14	1988	124045	8385	787	315
15	1989	123853	8372	785	294
16	1990	123998	8382	786	276
17	1991	123896	8375	785	258
18	1992	124204	8396	788	243
19	1993	124279	8401	789	228
20	1994	124112	8390	787	213
21	1995	123698	8362	783	198
22	1996	123014	8316	775	184
23	1997	122034	8249	765	170
24	1998	120746	8162	751	156
25	1999	119127	8053	733	143
26	2000	117149	7919	711	130
27	2001	114782	7759	686	117
28	2002	111995	7571	655	105
29	2003	108753	7352	620	93
30	2004	105025	7100	583	82
31	2005	101227	6843	546	72
32	2006	97358	6581	509	63
33	2007	93410	6315	470	54
34	2008	89378	6042	432	47
35	2009	85251	5763	394	40
36	2010	81023	5477	355	34
37	2011	76683	5184	315	28
38	2012	72223	4882	275	23
39	2013	67634	4572	235	18
40	2014	61486	4156	182	13
41	2015	54527	3686	124	8
42	2016	46684	3156	0	0
43	2017	36928	2496	0	0
44	2018	25968	1755	0	0
45	2019	13707	927	0	0
TOTALS			308669	25713	9546

APPENDIX III—(Continued)

Current Income for Cons (7)	Pres Val Cons Inc 6.760% (8)	Amount Avail to Plaintiff (9)	Present Value Amount Avail 6.760% (10)	Age
4239	3971	4839	4533	27
4477	3928	5101	4475	28
4730	3887	5378	4420	29
4999	3848	5671	4365	30
5282	3808	5975	4308	31
5582	3770	6295	4252	32
5898	3731	6630	4194	33
6228	3691	6976	4134	34
6580	3652	7340	4074	35
6804	3537	7574	3938	36
7037	3427	7814	3805	37
7279	3320	8062	3677	38
7530	3217	8316	3553	39
7790	3118	8577	3433	40
7443	2790	8228	3084	41
7699	2703	8485	2979	42
7282	2395	8067	2653	43
7533	2321	8321	2564	44
7778	2244	8567	2472	45
8017	2167	8804	2380	46
8264	2092	9047	2290	47
8520	2020	9295	2204	48
8773	1949	9538	2119	49
9031	1879	9781	2035	50
9298	1812	10031	1955	51
9574	1748	10286	1878	52
9861	1686	10546	1803	53
10158	1627	10813	1732	54
10460	1569	11080	1662	55
10314	1449	10898	1531	56
10166	1338	10712	1410	57
10020	1235	10529	1298	58
9877	1141	10347	1195	59
9736	1053	10168	1100	60
9598	973	9992	1012	61
9462	898	9817	932	62
9328	829	9643	857	63
9197	766	9472	789	64
10485	818	10720	836	65
10933	799	11116	812	66
11405	780	11528	789	67
12912	828	12912	828	68
13456	808	13456	808	69
14016	788	14016	788	70
14605	769	14605	769	71
389654	97181	415367	106727	

THE ENTRAPMENT DEFENSE IN FEDERAL COURTS: EMERGENCE OF A LEGAL DOCTRINE

*Kenneth M. Murchison**

The era of national prohibition, which began in 1920, lasted only 13 years.[1] Although historians differ as to why America attempted legislatively to end the use of alcohol as a beverage,[2] there can be little doubt that prohibition had a profound effect on the development of federal criminal law.[3] In order to capture and punish those who violated

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The opinions expressed herein are those of the author and do not necessarily represent the official views of the Department of the Air Force or any other agency of the United States Government.

[1] U.S. CONST. amend. XVIII (repealed 1933), U.S. CONST. amend. XXI, § 1.

[2] *Compare* A. SINCLAIR, PROHIBITION: THE ERA OF EXCESS 20 (1962) *with* P. ODEGARD, PRESSURE POLITICS: THE STORY OF THE ANTI-SALOON LEAGUE 78 (1928). One sociologist has explained the prohibition movement as a manifestation of the status conflict which underlies much of the nation's political strife:

> Political action has a meaning inherent in what it signifies as well as in what such action actually achieves. . . . Prohibition and Temperance . . . operated as symbolic rather than . . . instrumental goals in American politics. The passage of legislation or the act of public approval of Temperance has been as significant to the activities of the Temperance Movement as has the . . . achievement of an abstinent society. The agitation and struggle of the Temperance adherents has been directed toward the establishment of their norms as marks of social and political superiority.

J.R. GUSFIELD, SYMBOLIC CRUSADE: STATUS POLITICS AND THE AMERICAN TEMPERANCE MOVEMENT 166 (1963).

Other scholars have attributed the ratification of the eighteenth amendment to the war fever that gripped the nation at the time of ratification. *See, e.g.*, A. SINCLAIR, *supra* at 20.

The most plausible assessment of national prohibition, however, regards it as an integral part of the American progressive movement. Like other progressive reformers, advocates of prohibition relied on scientific, religious, social, and economic arguments to support their cause. *See generally* J.H. TIMBERLAKE, PROHIBITION AND THE PROGRESSIVE MOVEMENT 1900-1920 (1963); N. CLARK, THE DRY YEARS: PROHIBITION AND SOCIAL CHANGE IN WASHINGTON (1965).

[3] Prohibition filled the federal government's antiquated prisons, *e.g.*, A. SINCLAIR, *supra* note 2, at 212, and increased the caseload of the federal dockets to an unprecedented degree. *E.g.*, C. MERZ, THE DRY DECADE 146, 303 (1931).

It also forced lawyers to explain the relation between the eighteenth amendment and the fourth amendment. U.S. CONST. amend. XVIII (repealed 1933), U.S. CONST. amend. XXI, § 1. *See, e.g.*, Olmstead v. United States, 277 U.S. 438 (1928)(electronic wiretaps not controlled by fourth amendment); Carroll v. United States, 267 U.S. 132 (1925) (warrantless search of automobiles permissible when based on probable cause). One commen-

the prohibition laws, it was essential to provide suspects with the opportunity to commit an offense:[4]

> [T]here was even a speakeasy operated by the United States Government . . . . In the late fall of 1925 the [Prohibition Bureau's] undercover operatives leased the premises at 14 East Forty-fourth Street . . . and opened a plush booze joint which they called the Bridge Whist Club. There they sold liquor to all comers . . . .[5]

As a result of the federal government's prosecutorial efforts, the prohibition era furnished the federal judiciary with an increasing number of cases involving intrusive police enforcement of the laws.[6] The federal courts responded, in part, by fashioning the new criminal defense of entrapment, which disallowed conviction of a defendant whose criminal conduct was induced by law enforcement authorities. This initial response furnishes the focus of this article. A subsequent article[7] will discuss more recent developments in the entrapment defense.

I. Creation of a New Defense

A. Pre-Prohibition Developments

In 1908, California immigration agents suspected that Woo Wai, a Chinese-American businessman in San Francisco, had information about a smuggling ring operating on the Pacific coast. The officials resolved to catch Woo Wai in a smuggling violation so they could compel him to tell them what he knew about other suspected smugglers. Unable

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tator, lamenting the early prohibition cases involving searches, advised the Supreme Court to hold that the eighteenth amendment had repealed the fourth with regard to liquor cases. The rationale for this unique suggestion was as follows:

> The danger exists that if the Supreme Court does not recognize the fact of this repeal the Federal and State authorities in tacit agreement will nevertheless commit illegalities against individuals who know little of constitutional guarantees and circumvent the courts; and the host of decisions constantly arising under [the prohibition law] will serve as precedents by which the guarantees in question will be permanently undermined for all purposes.

Johnson, *Some Constititional Aspects of Prohibition Enforcement,* 97 Cent. L.J. 113, 123 (1924).

The eighteenth amendment also had an impact on the fifth amendment's double jeopardy prohibition. United States v. Lanza, 260 U.S. 377 (1922)(state prosecution no bar to subsequent federal prosecution for same act); *accord,* Abbate v. United States, 359 U.S. 187 (1959).

[4] Numerous authorities record the widespread use of "agent provocateuers" and other questionable enforcement techniques by federal prohibition agents. *See, e.g.*, C.A. Chambers, Seedtime of Reform 152-53 (1963); V. Dabney, Dry Messiah: The Life of Bishop Cannon 174 (1949); C. Merz, *supra* note 3, at 193.

[5] H. Asbury, The Great Illusion: An Informal History of Prohibition 214 (1950).

[6] See note 29 and accompanying text *infra.*

[7] Part II will appear in the September 1976 issue of the *Mississippi Law Journal.*

to secure evidence that would support prosecution of Woo Wai on any charge, the agents decided to trap him into violating the immigration laws, and an agent sought to enlist his participation in a plan to smuggle alien women into the country through Mexico.[8]

Woo Wai refused to have anything to do with the immigration officials' plot. Undismayed, the agents persisted for nearly 18 months to press the scheme on their unsuspecting victim. They assured him that the plan was foolproof, and twice they transported him to San Diego at government expense so immigration supervisors could assure him that they would offer complete protection. Woo Wai finally capitulated, and carried out the smuggling operation conceived and arranged by government agents.

As Woo Wai crossed the border with the aliens, immigration agents arrested him. After the arrest, the agents who had originally enlisted Woo Wai in the plot offered him immunity if he would testify against others whom they suspected of membership in a smuggling ring. When Woo Wai denied any knowledge of the other smuggling activities, the immigration authorities prosecuted him on a charge of conspiracy to smuggle aliens into the United States.

As a direct result of this tale of intrigue, entrapment was first recognized as a valid defense in federal court.[9] At trial, the district judge charged the jury that even if they believed all of the testimony concerning governmental inducement, Woo Wai had stated no defense recognized by law. After receiving these instructions, the jury convicted Woo Wai and all of his coconspirators who were not immigration officials. The United States Court of Appeals for the Ninth Circuit expressed its disapproval of the trial court's charge and of the Immigration Department's subterfuge by vacating Woo Wai's conviction and remanding the case for a new trial:

> We are of the opinion that it is against public policy to sustain a conviction obtained in the manner which is disclosed by the evidence in this case. Sound public policy can be upheld only by denying the criminality of those who are thus induced to commit acts which infringe the letter of the criminal statutes.[10]

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[8] Woo Wai v. United States, 223 F. 412 (9th Cir. 1915). At the trial, one immigration official explained the aim of the confidential agent who conceived the scheme: "He wanted to get this man, as it were, in the door, so that the man would have to give him the information." *Id.* at 413.

[9] The Michigan Supreme Court claims that its decision in Saunders v. People, 38 Mich. 218 (1878), made it the first state court to embrace the entrapment defense. *See* People v. Turner, 390 Mich. 7, 210 N.W.2d 336 (1973).

[10] Woo Wai v. United States, 223 F. 412, 415 (9th Cir. 1915). In addition to its entrapment ruling, the court also held that the government had failed to prove a conspiracy because the officers in the scheme never intended to commit the offense. The alternate

A casual survey of the federal criminal law in 1915 illustrates the innovative nature of the Ninth Circuit's position in *Woo Wai*.[11] The Supreme Court precedents—in a series of mail fraud cases[12]—were contrary, and the Ninth Circuit did not cite any reported decisions of the lower federal courts.[13]

During the 5-year period between the *Woo Wai* decision and the era of national prohibition, 1915 to 1920, federal acceptance of the entrapment defense proceeded slowly. The Ninth Circuit ordered new trials on entrapment grounds in two more cases,[14] but only the Seventh Circuit followed suit.[15] One of the Ninth Circuit cases, *Yick v. United States*,[16] involved an immigration scheme similar to that of the *Woo Wai* case. Sam Yick approached a customs inspector and asked him to prepare some false immigration papers. Instead of prosecuting Yick for the viola-

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holding attempted to expand the legal principle that a conspiracy required an agreement between at least two persons to commit an unlawful act. This common law requirement meant that if one of two parties to a conspiracy was a police officer acting to apprehend the other party, there would be no conspiracy because the police officer never really intended to commit the offense. The distinguishing feature of the *Woo Wai* case, however, is apparent: Woo Wai had other associates in the conspiracy who were not police officers. Thus, the conspiracy had the requisite minimum of two members.

[11] The Ninth Circuit did not completely spin the defense from whole cloth. Apparently, the entrapment doctrine grew out of the "consent" defenses available to accessories to a crime. At common law, when the principle offender had obtained permission to do what would otherwise be an illegal act, a person who assisted him could not be convicted as an accessory because the principal was not violating the law. For example, one was not an accessory to burglary when the principal had secured the owner's permission to enter the building burgled. *See, e.g.*, State v. Hayes, 105 Mo. 76, 16 S.W. 514 (1891). Similarly, a conspiracy conviction required an agreement by two or more persons to commit an unlawful act. If all but one of the parties to a conspiracy were police officers acting to apprehend the sole remaining conspirator, the lack of an agreement between two persons, both of whom had a bona fide intent to violate the law, precluded the formation of a conspiracy. *See* note 10 *supra*.

[12] *See* Price v. United States, 165 U.S. 311 (1897); Andrews v. United States, 162 U.S. 420 (1896); Grimm v. United States, 156 U.S. 604 (1895).

[13] Woo Wai v. United States, 223 F. 412, 415-16 (9th Cir. 1915), *citing* Love v. People, 160 Ill. 501, 43 N.E. 710 (1896); People v. McCord, 76 Mich. 200, 42 N.W. 1106 (1889); Saunders v. People, 38 Mich. 218 (1878); People v. Mills, 178 N.Y. 274, 70 N.E. 786 (1904); Commonwealth v. Wasson, 42 Pa. Sup. Ct. 38 (1910); Commonwealth v. Bickings, 12 Pa. Dist. R. 206 (1903); O'Brien v. State, 6 Tex. App. 665 (1879).

Of the leading criminal law texts in 1915, only Clark and Marshall's work recognized the defense. *See* 1 J.P. BISHOP, NEW COMMENTARIES ON THE CRIMINAL LAW §§ 255-63, at 138-44 (8th ed. 1892); 1 W. CLARK & W. MARSHALL, THE LAW OF CRIMES § 162, at 347-48 (1900); 1 F. WHARTON, CRIMINAL LAW § 389, at 501-04 (11th ed. 1912). *See generally* De Feo, *Entrapment as a Defense to Criminal Responsibility*, 1 U. SAN FRAN. L. REV. 245 (1967).

[14] Peterson v. United States, 255 F. 433 (9th Cir. 1919); Yick v. United States, 240 F. 60 (9th Cir. 1917).

[15] Voves v. United States, 249 F. 191 (7th Cir. 1918).

[16] 240 F. 60 (9th Cir. 1917).

tion, the inspector enticed him to bring Orientals into the country and later had Yick prosecuted for the more serious crime of conspiracy to bring aliens into the country illegally. Although the trial record contained no evidence that the conspiracy originated with Yick, the lower court refused to submit the entrapment defense to the jury. Notwithstanding the recent *Woo Wai* decision, the trial judge instructed the jury that "the fact . . . that government officers incited or aided defendants to commit the crime charged against them . . . is no bar to a prosecution by the government."[17] Reaffirming its position on the entrapment defense, the Ninth Circuit reversed Yick's conviction and ordered a new trial. "[W]here the officers of the law have incited the party to commit the crime charged and lured him on to its consummation, the law will not authorize a verdict of guilty."[18]

In *Peterson v. United States,*[19] the Ninth Circuit again reversed a conviction on entrapment grounds. Charged with the wartime offense of selling liquor to soldiers in uniform, Mrs. Peterson testified that government undercover agents had harassed her for over 3 hours before she agreed to sell them any beer. The district court refused to submit the entrapment defense to the jury and gave the following charge:

> [T]here is a class of offenses, like the unlawful selling of intoxicating liquor, frequently committed by people who are cunning, and it is difficult to secure the evidence necessary to a conviction by any other means, except by the use of decoys; and you are instructed that if it appears in this case that the officers had information which led them to believe . . . that the defendant was engaged in selling intoxicating liquor to members of the military service, while in uniform, it was very proper for them to initiate an investigation, and if the two soldiers . . . clad in uniform, went there and solicited beer and offered to buy it, and urged [the defendant] to sell it to them, the fact that they urged her to sell the beer to them is no excuse.[20]

On appeal the court held that this instruction was contrary to the "settled rule in this circuit," reversed Mrs. Peterson's conviction, and remanded the case for a new trial.[21]

Voves v. United States,[22] involved a singularly atrocious scheme. Government agents, unable to induce Voves to violate the federal law prohibiting the sale of liquor to Indians, devised a scheme to trick him

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[17] *Id.* at 64.
[18] *Id.* at 65.
[19] 255 F. 433 (9th Cir. 1919).
[20] *Id.* at 436.
[21] *Id.* at 433.
[22] 249 F. 191 (7th Cir. 1918).

into violating the statute.[23] The agents disguised an Indian to resemble one of the Mexican laborers who were working on a road gang in the area and sent him to Voves' establishment. When Voves unwittingly sold liquor to the disguised Indian, government agents immediately arrested him. Reversing a lower court conviction, the Seventh Circuit leveled this blast at the conduct of the government agents:

> Is our government of the superman type that releases the ruler from the obligations of honesty and fairness that are imposed on the citizens? Is one's liberty or reputation as a law-abider to have less protection than his property? We are strongly of the view that sound public policy estops the government from asserting that an act which involves no criminal intent was voluntarily done when it originated in and was caused by the government agents' deception.[24]

These three cases, however, remained isolated exceptions to the federal criminal law of 1920. A majority of the federal decisions continued to uphold convictions for mail fraud,[25] selling liquor to soldiers in uniform,[26] and maintaining a house of ill fame within 5 miles of a military reservation[27] against entrapment challenges with several cases altogether denying the existence of an entrapment defense.[28]

B. The Prohibition Era: Increased Acceptance of the Defense

The onset of national prohibition coincided with a dramatic increase in the number of federal opinions discussing the entrapment issue. Between 1920 and 1925, 41 decisions referred to the existence of the defense; moreover, all but 5 of these cases involved alcohol or drug-related offenses.[29] Although only five cases actually reversed lower court

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[23] The statute prohibited sales to Indians regardless of whether the prosecution proved that the seller knew the purchasers were Indians. A 1926 news article criticized a similar Idaho case, in which the Idaho defendant sold cigarettes to a police decoy who was seventeen years old but who appeared much older. Apparently, the state supreme court allowed the conviction to stand. 30 LAW NOTES 143 (1926).

[24] 249 F. at 192.

[25] *See* Freeman v. United States, 243 F. 353 (9th Cir. 1917), *cert. denied,* 249 U.S. 600 (1919); Hanish v. United States, 227 F. 584 (7th Cir. 1915).

[26] *See* Fetters v. United States, 260 F. 142 (9th Cir. 1919); Goldstein v. United States, 256 F. 813 (7th Cir. 1919).

[27] Brown v. United States, 260 F. 752 (9th Cir. 1919).

[28] *E.g.*, Partan v. United States, 261 F. 515 (9th Cir. 1919); Goldstein v. United States, 256 F. 813 (7th Cir. 1919).

[29] The cases involving neither drug- nor alcohol-related offenses were: Schriber v. United States, 4 F.2d 97 (6th Cir. 1925) (bribery); Ritzman v. United States, 3 F.2d 718 (D.C. Cir. 1925) (bribery); Conway v. United States, 1 F.2d 274 (7th Cir. 1924) (mail theft); Browne v. United States, 290 F. 870 (6th Cir. 1923) (illegal sale of war materials); and Martin v. United States, 278 F. 913 (2d Cir. 1921) (bribery).

Nineteen of the cases discussing the entrapment defense concerned crimes associated

convictions, the Ninth Circuit's definition of the entrapment defense in *Woo Wai* became widely accepted.[30]

Butts v. United States,[31] the first of the five reversals between 1920 and 1925, continued the pattern of recognizing the defense only in outrageous fact situations. Mr. Butts, an admitted morphine addict, had

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with the use of alcohol: Capuano v. United States, 9 F.2d 41 (1st Cir. 1925) (bribery of prohibition agents); Lewis v. United States, 4 F.2d 520 (5th Cir. 1925) (transportation of intoxicating liquor); DeLong v. United States, 4 F.2d 244 (8th Cir. 1925)(sale of intoxicating liquor); Orsatti v. United States, 3 F.2d 778 (9th Cir.), *cert. denied*, 268 U.S. 694 (1925) (bribery of prohibition agents); Murphy v. United States, 2 F.2d 599 (5th Cir. 1924) (sale of intoxicating liquor); Jordan v. United States, 2 F.2d 598 (5th Cir. 1924)(sale of intoxicating liquor); Reyff v. United States, 2 F.2d 39 (9th Cir. 1924)(possession, sale and transportation of intoxicating liquor); Johnstone v. United States, 1 F.2d 928 (9th Cir. 1924) (sale of intoxicating liquor); Sabbatino v. United States, 298 F. 409 (2d Cir.), *cert. denied*, 266 U.S. 602 (1924)(bribery of prohibition agents); De Marco v. United States, 296 F. 667 (4th Cir. 1924), *cert. denied*, 265 U.S. 593 (1925)(bribery of prohibition agent); Rossi v. United States, 293 F. 896 (8th Cir. 1923) (contempt citation for violation of National Prohibition Act injunction); Ritter v. United States, 293 F. 187 (9th Cir. 1923) (sale of intoxicating liquor); United States v. Reisenweber, 288 F. 520 (2d Cir. 1923)(nuisance under National Prohibition Act); Zucker v. United States, 288 F. 12 (3d Cir.), *cert. denied*, 262 U.S. 756 (1923)(conspiracy to sell intoxicating liquor); Luterman v. United States, 281 F. 374 (3d Cir. 1922)(forgery of liquor stamps); Billingsley v. United States, 274 F. 86 (6th Cir. 1921) (interstate transportation of intoxicating liquor); Farley v. United States, 269 F. 721 (9th Cir. 1921)(carrying on retail liquor business without paying required tax); Saucedo v. United States, 268 F. 830 (5th Cir. 1920)(sale of intoxicating liquor); Ramsey v. United States, 268 F. 825 (6th Cir. 1920)(sale of intoxicating liquor).

The following concerned drug-related offenses: Cline v. United States, 9 F.2d 621 (9th Cir. 1925)(sale of morphine); Cermak v. United States, 4 F.2d 99 (6th Cir. 1925)(sale of narcotics); Napolitano v. United States, 3 F.2d 994 (1st Cir.), *cert. denied*, 269 U.S. 553 (1925)(sale of morphine); Di Salvo v. United States, 2 F.2d 222 (8th Cir. 1924)(sale of narcotics); Rosso v. United States, 1 F.2d 717 (3d Cir. 1924)(possession of cocaine); Bethea v. United States, 1 F.2d 290 (7th Cir. 1924) (sale of narcotics); Simmons v. United States, 300 F. 321 (6th Cir. 1924)(sale of narcotic drugs by physicians); Newman v. United States, 299 F. 129 (4th Cir. 1924)(sale of narcotic drugs by physician); Leon v. United States, 290 F. 384 (9th Cir.), *cert. denied*, 263 U.S. 710 (1923)(sale of narcotics); Nutter v. United States, 289 F. 484 (4th Cir. 1923)(sale of morphine); Aultman v. United States, 289 F. 251 (5th Cir. 1923)(importation, possession, and sale of morphine and cocaine); Smith v. United States, 284 F. 673 (8th Cir.), *cert. denied*, 261 U.S. 617 (1923)(conspiracy to sell narcotics); Lucadamo v. United States, 280 F. 653 (2d Cir. 1922)(conspiracy to sell narcotic drugs); Fisk v. United States, 279 F. 12 (6th Cir. 1922)(sale of narcotic drugs); Butts v. United States, 273 F. 35 (8th Cir. 1921)(sale of narcotic drugs); Rothman v. United States, 270 F. 31 (2d Cir. 1920)(sale of narcotic drugs by physician and pharmacists); Fiunkin v. United States, 265 F. 1 (9th Cir. 1920) (sale of narcotic drugs).

[30] *See, e.g.*, Bethea v. United States, 1 F.2d 290 (7th Cir. 1924); Sabbatino v. United States, 298 F. 409, 411 (2d Cir.), *cert. denied*, 266 U.S. 602 (1924); DeMarco v. United States, 296 F. 667 (4th Cir. 1924); Luterman v. United States, 28 F. 374 (3d Cir. 1922). The Ninth Circuit reaffirmed its adherence to the entrapment rule in Ritter v. United States, 293 F. 187, 188-89 (9th Cir. 1923), *citing* Peterson v. United States, 255 F. 433 (9th Cir. 1919).

[31] 273 F. 35 (8th Cir. 1921).

become addicted while taking the drug to relieve the pain from 18 operations for tuberculosis of the bones. He had, however, never sold morphine when an acquaintance approached him for help in procuring a small quantity of the drug.

According to Butts' testimony, the friend played on his sympathy by claiming that he was in such severe pain that he could not stand it if he did not get some morphine. After several plaintive pleas, Butts procured a small amount of the narcotic and sold it to his friend at no profit. Butts then learned that his supposed friend was working as an undercover agent to avoid prosecution for an earlier narcotics offense. On the basis of this one sale, federal officials prosecuted Butts for selling narcotic drugs. The trial court refused an entrapment instruction, and the jury convicted him.

The Eighth Circuit reversed, emphasizing that the "first duties of the officers of law are to prevent, not to punish crime," and "it is not their duty to incite to and create crime for the sole purpose of prosecuting and punishing it."[32] In Butts' case, the court continued, the evidence strongly tended to prove that the officials had caused the crime in order to punish it. The court ordered a new trial, declaring it

> unconscionable, contrary to public policy, and to the established law of the land to punish a man for the commission of an offense of the like of which he had never been guilty, either in thought or in deed, and evidently never would have been guilty if the officers of the law had not inspired, incited, persuaded, and lured him to attempt to commit it.[33]

The second decision reversing a conviction on entrapment grounds during the 1920-1925 period was *Di Salvo v. United States*.[34] Here it was the district judge's charge to the jury, rather than the police conduct, that was so bizarre. Mr. Di Salvo testified that a female government informer enticed him into selling her narcotics.

> There was evidence tending to show that the defendant had never theretofore dealt in narcotics, that the officers participated in devising the criminal act, aided [the informer] in inducing it, and sent her after the defendant with money and the beguiling pleas of a woman's tongue when he had dropped out of the proposed [plan] and was about to escape.[35]

The trial judge severely limited defense attempts to elicit further evidence of government inducement by cross-examining government

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[32] *Id.* at 38.

[33] *Id.*

[34] 2 F.2d 222 (8th Cir. 1924).

[35] *Id.* at 225.

witnesses. Moreover, his instructions to the jury made conviction a religious obligation.

> All of you recall the beautiful story that Jesus of Nazareth gave the world when He was here, and you recall the tragedy of His crucifixion, when on the last night before His crucifixion He knew that He was going to be betrayed. He went down to Jerusalem; told His followers that He would be betrayed, and so went to Jerusalem and told them further that He would be crucified. It may be argued that by going to Jerusalem He tempted Judas Iscariot; that He could have remained away and saved Judas Iscariot from committing the despicable crime he did commit in betraying his Master. . . . It might be said that Jesus was urging him to go and commit a crime, the greatest crime that is known to man. But, it was in the heart of this man. It was really giving him the opportunity to commit crime if he was disposed to commit the crime.[36]

From this scriptural allusion, the judge drew the following homily for the jury:

> These officers, in going there with [the informer] and having her call this man to the room at 516 Cordova Hotel, were only giving this man an opportunity to commit crime if he were disposed to commit a crime, and there was no [other] method whereby they could detect men who were violating that act. So, the court must charge you that there was no entrapment in [this] case.[37]

Terming the entrapment illustration "incongruous," the Eighth Circuit concluded that a jury could not act "without passion and prejudice in such an atmosphere." Whether the agents stopped with setting a decoy for a suspected law breaker or whether they enticed an innocent citizen into a violation "raised an issue of fact . . . and it was [reversible] error to refuse . . . to instruct the jury on that subject . . . ."[38]

The third conviction reversed during this period, *Cermak v. United States,*[39] also involved a narcotics prosecution. The district court refused to submit the entrapment issue to the jury at Cermak's trial even though the defense offered evidence that Cermak, a drug store clerk, made the narcotics sale only after the government's addict-informer pleaded with him at great length. The Sixth Circuit, terming the case before it "the typical case in which the defense of entrapment should be sustained, upon the grounds of public policy stated in the Woo Wai Case,"[40] re-

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[36] *Id.* at 226, *quoting* charge of the trial judge.
[37] *Id.* at 226.
[38] *Id.* at 225.
[39] 4 F.2d 99 (6th Cir. 1925).
[40] *Id.*

versed the conviction and remanded the case for a new trial.

The remaining two cases where an entrapment defense was successfully asserted on appeal involved offenses related to the national prohibition laws. In each case, the court of appeals, after a brief discussion of the entrapment defense, reversed the conviction and remanded the case for a new trial.[41]

In the remaining years of national prohibition, the total number of cases in which the entrapment defense was discussed leveled off, but an increasing percentage involved offenses related to national prohibition. All but 1 of the 39 appellate opinions that discussed the defense involved either narcotics or liquor offenses with over two-thirds being prohibition-related cases.[42] The courts of appeals reversed convictions

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[41] Lewis v. United States, 4 F.2d 520 (5th Cir. 1925), involved a scheme to transport illicit liquor from Bimini to Miami. The evidence conflicted on the question of whether the prohibition agents or the defendant initiated the negotiations. Nevertheless, the district court severely limited defense counsel's attempt to develop the point on cross-examination and refused to submit the issue to the jury. With a brief discussion that relied on Di Salvo v. United States, 2 F.2d 222 (8th Cir. 1924), the Fifth Circuit overturned the conviction and sent the case back for a new trial.

Capuano v. United States, 9 F.2d 41 (1st Cir. 1925), was the last case in the 1920-1925 period in which a court reversed a conviction on entrapment grounds. A district court jury convicted Capuano of bribing federal prohibition agents. Once again, the trial judge refused to submit an entrapment instruction in spite of sharply conflicting evidence concerning the alleged wrongdoing. Capuano testified that he began "paying off" the prohibition agents only after the agents beat him and threatened him with loss of his permit for denatured alcohol if he did not cooperate. The First Circuit reversed Capuano's conviction and remanded the case for a new trial before a properly instructed jury.

[42] The alcohol-related cases were: Meyer v. United States, 67 F.2d 223 (9th Cir. 1933)(possession and transportation of intoxicating liquor); Bonnoyer v. United States, 63 F.2d 93 (1st Cir. 1933)(conspiracy to transport and possess intoxicating liquor); Hunter v. United States, 62 F.2d 217 (5th Cir. 1932) (transportation and sale of intoxicating liquor); Beard v. United States, 59 F.2d 940 (8th Cir. 1932)(transportation of intoxicating liquor); Flynn v. United States, 57 F.2d 1044 (8th Cir.), *cert. denied*, 287 U.S. 627 (1932)(transportation and sale of intoxicating liquor); Sorrells v. United States, 57 F.2d 973 (4th Cir.), *rev'd*, 287 U.S. 584 (1932) (sale of intoxicating liquor); O'Brien v. United States, 51 F.2d 674 (7th Cir. 1931) (possession, transportation, and sale of intoxicating liquor); Pall v. United States, 46 F.2d 461 (4th Cir. 1931)(violation of the National Prohibition Act); Patton v. United States, 42 F.2d 68 (8th Cir. 1920)(conspiracy to bribe a prohibition agent); Buckley v. United States, 33 F.2d 713 (6th Cir. 1929) (bribery of a prohibition agent); Polaski v. United States, 33 F.2d 686 (8th Cir.), *cert. denied*, 280 U.S. 591 (1929)(conspiracy to violate the National Prohibition Act); Robinson v. United States, 32 F.2d 505 (8th Cir. 1929)(bribery of a prohibition agent); DeMayo v. United States, 32 F.2d 472 (8th Cir. 1929)(introduction of intoxicating liquor into Indian Territory); Porter v. United States, 31 F.2d 544 (8th Cir. 1929)(possession and sale of intoxicating liquor); Ybor v. United States, 31 F.2d 42 (5th Cir. 1929)(bribery of a federal prohibition agent); Newman v. United States, 28 F.2d 681 (9th Cir. 1928), *cert. denied*, 279 U.S. 839 (1929)(bribery of a prohibition agent); Gargano v. United States, 24 F.2d 625 (5th Cir. 1928)(bribery of a prohibition agent); Driskill v. United States, 24 F.2d 525 (9th Cir. 1928)(possession and sale of intoxicating liquor); Corcoran v. United States, 19 F.2d 901

on entrapment grounds in seven cases, all but one of which involved prohibition offenses.[43] The growing acceptance of the defense was evidenced by the fact that in many of the cases affirmed on appeal, the trial court had submitted the entrapment issue to the jury.[44]

As judicial recognition of the defense grew, however, burden of proof and evidentiary problems associated with assertion of the defense began to appear.[45] Thus, the decisions gradually placed less emphasis on unique factual situations than on the relatively unemotional question of whether the defense offered any credible evidence tending to show that the criminal intent originated with the government. If there was any such evidence, the trial court risked reversal by refusing to submit the issue to the jury.[46] In *Silk v. United States,*[47] one of several defendants

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(8th Cir. 1927) (sale of intoxicating liquor); Hadley v. United States, 18 F.2d 507 (8th Cir. 1927) (possession of intoxicating liquir); St. Clair v. United States, 17 F.2d 886 (8th Cir. 1927) (possession, transportation, and sale of intoxicating liquor); Silk v. United States, 16 F.2d 568 (8th Cir. 1926), *modified*, 19 F.2d 73 (1927) (unlawful transportation and sale of intoxicating liquor); Widerman v. United States, 10 F.2d 745 (8th Cir. 1926) (sale of intoxicating liquor); Kendjerski v. United States, 9 F.2d 909 (6th Cir. 1926) (sale of intoxicating liquor).

The drug-related cases were: Wall v. United States, 65 F.2d 993 (5th Cir. 1933)(conspiracy to sell narcotic drugs); Price v. United States, 56 F.2d 135 (7th Cir. 1932)(sale of morphine); Swallum v. United States, 39 F.2d 390 (8th Cir. 1930) (sale of morphine by physician); Sargent v. United States, 35 F.2d 344 (9th Cir. 1929) (sale of morphine by physician); Sauvain v. United States, 31 F.2d 732 (8th Cir. 1929) (possession and sale of morphine); Lawrence v. United States, 28 F.2d 608 (8th Cir. 1928) (sale of morphine); Boehm v. United States, 21 F.2d 283 (8th Cir. 1927) (sale of narcotic drugs); Cain v. United States, 19 F.2d 472 (8th Cir. 1927) (sale of morphine); Vamvas v. United States, 13 F.2d 347 (5th Cir. 1926) (sale of cocaine); C.M. Spring Drug Co. v. United States, 12 F.2d 852 (8th Cir. 1926) (sale of morphine); Perez v. United States, 10 F.2d 352 (9th Cir. 1926) (sale of morphine).

The lone exception to the stream of prohibition and narcotics cases involved interstate transportation of obscene material. United States v. Becker, 62 F.2d 1007 (2d Cir. 1933).

[43] Wall v. United States, 65 F.2d 993 (5th Cir. 1933); Hunter v. United States, 62 F.2d 217 (5th Cir. 1932); O'Brien v. United States, 51 F.2d 674 (7th Cir. 1931); Robinson v. United States, 32 F.2d 505 (8th Cir. 1929); Driskill v. United States, 24 F.2d 525 (9th Cir. 1928); Jarl v. United States, 19 F.2d 891 (8th Cir. 1927); Silk v. United States, 16 F.2d 568 (8th Cir. 1926), *modified*, 19 F.2d 73 (1927). The *Wall* case was the only one that did not involve a prohibition related offense.

[44] *See, e.g.*, Buckley v. United States, 33 F.2d 713 (6th Cir. 1929); Gargano v. United States, 24 F.2d 625 (5th Cir. 1928); Hadley v. United States, 18 F.2d 507 (8th Cir. 1927).

[45] *E.g.*, Ybor v. United States, 31 F.2d 42, 44 (5th Cir. 1929) (evidence of defendant's knowledge of prior bribe offers admissible on entrapment issue); Boehm v. United States, 21 F.2d 283, 284-85 (8th Cir. 1927) (entrapment defense waived by failure to request entrapment instruction); Corcoran v. United States, 19 F.2d 901, 903 (8th Cir. 1927) (entrapment defense waived by defense's objection to prosecution's rebuttal evidence).

[46] See notes 31 through 41 and accompanying text *supra.*

[47] 16 F.2d 568 (8th Cir. 1926), *modified*, 19 F.2d 73 (8th Cir. 1927). The *Silk* decision concerned two defendants whose trials were consolidated by the district court. Both defen-

testified that he had made the illicit liquor sales only after repeated pleas and pressure from government agents. The Eighth Circuit ruled that this testimony presented "a question of fact for the jury upon the issue of entrapment."[48] Similarly, the defendant in *Jarl v. United States*[49] testified that he became involved in a scheme to violate the National Prohibition Act only after prohibition agents had repeatedly pleaded with him to do so. Again, the appellate court reversed the conviction and remanded the case for a new trial, holding that "where the evidence on the question of entrapment is in conflict it presents an issue of fact for the jury on proper instructions . . . ."[50] *Robinson v. United States*,[51] involved the prosecution of a prohibition agent for accepting a bribe from a person against whom the agent was to testify in a criminal action. Testifying at his own trial, the agent said that he took the money merely to obtain evidence to support a bribery prosecution against the man who offered the bribe. The court ruled that this testimony raised an entrapment issue that should have been left for the jury.[52]

Similar reversals occurred in the Fifth and Ninth Circuits,[53] and appellate decisions that affirmed convictions treated the entrapment defense as raising an issue for the jury.[54] In 15 years, the defense had

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dants were convicted of selling and transporting intoxicating liquor. At trial, one defendant, Silk, denied all involvement in the sale. The other, Meeks, admitted making certain sales but said he made them only after prohibition agents applied great pressure. The Eighth Circuit reversed Meeks' conviction but allowed Silk's conviction on the substantive counts to stand.

[48] *Id.* at 570.

[49] 19 F.2d 891 (8th Cir. 1927).

[50] *Id.* at 896.

[51] 32 F.2d 505 (8th Cir. 1929).

[52] *Id.* at 510. The court did not reverse the conviction on the entrapment issue but on whether Robinson, a federal prohibition agent, accepted money with the intent to alter his testimony. The court held that the trial judge should have submitted the question to the jury. The court's final opinion—after a rehearing—also indicated, however, that Robinson's entrapment allegation should go to the jury.

[53] Hunter v. United States, 62 F.2d 217 (5th Cir. 1932); Driskill v. United States, 24 F.2d 525 (9th Cir. 1928). In *Hunter*, the Fifth Circuit required submission of the entrapment question to the jury in a prohibition case because the informer told the defendant, whom he had just met, that he needed the liquor for his sick mother. The Ninth Circuit, in *Driskill*, held that the defendant presented an entrapment issue for the jury when the informer made several pleas before the defendant consummated the sale and the officers had no reason to suspect the defendant of prior illegal sales. *See also* Wall v. United States, 65 F.2d 993 (5th Cir. 1933).

[54] *See, e.g.*, Patten v. United States, 42 F.2d 68 (8th Cir. 1930); Ybor v. United States, 31 F.2d 42 (5th Cir. 1929). *But see* O'Brien v. United States, 51 F.2d 674 (7th Cir. 1931). In *O'Brien* the court reversed a conviction on entrapment grounds even though the district court had submitted the issue to the jury. O'Brien and his codefendants were accused of conspiring to violate the National Prohibition Act. A prohibition agent who operated a

grown from an ad hoc weapon to handle bizarre cases to a legal doctrine that was regularly asserted in federal court appeals from liquor and drug convictions. By the early 1930's each of the federal circuits recognized the defense.[55] The boundaries of the defense, however, were not always clear.[56] Generally, the opinions emphasized the "origin" of the defendant's intent to violate the criminal law. Whenever there was conflicting evidence on this question, the appellate courts required instructions that, in effect, asked the jury to decide whether the defendant was a law-abiding citizen who had been tempted to crime by overzealous government agents or a confirmed criminal that the government had finally captured by tricking him into a violation for which he could be convicted.

> [In] cases where the criminal intent originates in the mind of the defendant, the fact that the officers of the government used decoys or untruthful statements to furnish opportunity for or to aid the accused in the commission of a crime, in order successfully to prosecute him therefor, constitutes no defense to such a prosecution . . . .
>
> But when the accused has never committed such an offense as that charged against him prior to the time when he is charged with the offense prosecuted, and never conceived any intention of committing the offense prosecuted, or any such offense, and had not the means to do so, the fact that the officers of the government incited and by persuasion and representation lured him to commit the offense charged, in order to entrap, arrest, and prosecute him therefor, is and ought to

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pool hall as a front for a bootlegging operation had originated the conspiracy. He then persuaded the defendants, most of whom were members of the Indianapolis Police Department, to join him in the illegal scheme. The Seventh Circuit reversed the conspiracy convictions and ordered judgments of acquittal. The court reviewed the proof presented at trial and found "no evidence in the record that any of the appellants had, prior to the opening of the pool hall, disclosed any disposition to enter into a criminal conspiracy to violate the prohibition law." *Id.* at 680. The lack of proof, the court held, established the entrapment defense as a matter of law and therefore it was improper to refer the case to the jury.

[55] O'Brien v. United States, 51 F.2d 674 (7th Cir. 1931); Shields v. United States, 26 F.2d 993 (D.C. Cir. 1928); Capuano v. United States, 9 F.2d 41 (1st Cir. 1925); Lewis v. United States, 4 F.2d 520 (5th Cir. 1925); Cermak v. United States, 4 F.2d 99 (6th Cir. 1925); Di Salvo v. United States, 2 F.2d 223 (8th Cir. 1924); Newman v. United States, 299 F. 128 (4th Cir. 1924); Sabbatino v. United States, 298 F. 409 (2d Cir.), *cert. denied,* 266 U.S. 602 (1924); Luterman v. United States, 281 F. 374 (3d Cir. 1922); Woo Wai v. United States, 223 F. 412 (9th Cir. 1915); *see* Sorrells v. United States, 57 F.2d 973, 978 n.1 (4th Cir. 1932) (dissenting opinion).

[56] *Compare* O'Brien v. United States, 51 F.2d 674 (7th Cir. 1931), *with* Wall v. United States, 65 F.2d 993 (5th Cir. 1933), *and* C.M. Spring Drug Co. v. United States, 12 F.2d 852 (8th Cir. 1926). Commentators were divided on whether the judge or the jury should pass on the entrapment issue. *See* 28 COLUM. L. REV. 1067 (1928); 20 NW. U.L. REV. 401 (1925).

be fatal to the prosecution and to entitle the accused to a verdict of not guilty.[57]

II. Supreme Court Recognition

During the decade and a half that the federal courts of appeals struggled to create, define, and restrict the entrapment doctrine, the Supreme Court provided little guidance to the lower federal courts. Twelve times the Court declined to review entrapment decisions of the appellate courts.[58] By 1928, however, at least two members of the Court were ready to confront the issue. In *Casey v. United States,*[59] the Court granted certiorari to determine the constitutionality of a statutory presumption in the Harrison Anti-Narcotic Drug Act. The entrapment issue was raised inadvertently when the record revealed an entrapment claim that Casey had never pursued.

Suspecting Casey, an attorney, of supplying jail inmates with illegal drugs, federal narcotics agents persuaded a prisoner and the wife of a second prisoner to help them trap the attorney into a violation. The plan called for the prisoner to request a conference with Casey; at the conference, he would attempt to purchase some morphine. The agents installed a dictaphone in the attorney's cage where the attorney and the prisoner were to confer and arranged to eavesdrop on the meeting. According to agents' testimony, Casey agreed to sell the morphine, accepted payment from the prisoner, and agreed to deliver the narcotic to the second prisoner's wife. The next day, Casey delivered to the woman a towel which chemical tests revealed to contain morphine.[60]

Mr. Justice Brandeis' dissenting opinion, in which Mr. Justice Roberts concurred, refused to discuss the statutory presumption that the case was intended to present. Instead, Brandeis argued that the prosecution was invalid since federal officers "instigated the commission of the alleged crime." He argued that "the obstacle to the prosecution is . . .

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[57] Butts v. United States, 273 F. 35, 37-38 (8th Cir. 1921).

[58] *See* Flynn v. United States, 57 F.2d 1044 (8th Cir.), *cert. denied*, 287 U.S. 627 (1932); Polski v. United States, 33 F.2d 686 (8th Cir.), *cert. denied*, 280 N.W. 591 (1929); Newman v. United States, 28 F.2d 681 (9th Cir. 1928), *cert. denied*, 279 U.S. 839 (1929); Napolitano v. United States, 3 F.2d 994 (1st Cir.), *cert. denied*, 269 U.S. 553 (1925); Orsatti v. United States, 3 F.2d 778 (9th Cir.), *cert. denied*, 268 U.S. 694 (1925); Sabbatino v. United States, 298 F. 409 (2d Cir.), *cert. denied*, 266 U.S. 602 (1924); De Marco v. United States, 296 F. 667 (4th Cir. 1924), *cert. denied*, 265 U.S. 593 (1925); Leon v. United States, 290 F. 384 (9th Cir.), *cert. denied*, 263 U.S. 710 (1923); Zucker v. United States, 288 F. 12 (3d Cir.), *cert. denied*, 263 U.S.756 (1923); Smith v. United States, 284 F. 673 (8th Cir.), *cert. denied*, 261 U.S. 617 (1923); Parton v. United States, 261 F. 515 (9th Cir. 1919), *cert. denied*, 251 U.S. 561 (1920); Freeman v. United States, 243 F. 353 (9th Cir.), *cert. denied*, 249 U.S. 600 (1919).

[59] 276 U.S. 413 (1928).

[60] *Id.* at 421-23 (Brandeis, J., dissenting).

that the act for which the Government seeks to punish is the product of a criminal conspiracy by government agents to induce its commission." While "the Government may set decoys to entrap criminals," he wrote, "it may not provoke or create a crime and then punish the criminal, its creature." The dissent attached no legal significance to Casey's failure to raise the entrapment issue. This prosecution, Mr. Justice Brandeis reasoned,

> should be stopped, not because some right of Casey's has been denied, but in order to protect the government. To protect it from illegal conduct of its officers. To preserve the purity of its courts. In my opinion, the judgment should be vacated with direction to quash the indictment.[61]

In an opinion written by Mr. Justice Holmes, the majority held the statutory presumption constitutional and refused to consider the entrapment problem. "A court," Holmes stated, "can rarely act with advantage of its own motion, and very rarely upon grounds that the record was not intended to present." Describing the agents' conduct as no "worse than ordering a drink of a suspected bootlegger," the majority concluded that:

> Whatever doubts we may feel as to the truth of the testimony we are not at liberty to consider them on the only question before the Court. The grounds for uneasiness can be considered only by another power.[62]

Four years later, the Supreme Court first addressed the merits of the entrapment defense in *Sorrells v. United States*.[63] The case began on November 30, 1930, when the grand jury for the Western District of North Carolina indicted Sorrells on two counts of violating the National Prohibition Act. The first count of the indictment charged that, on July 13, 1930, Sorrells unlawfully possessed one-half gallon of whiskey with intent to sell it. Count two charged that, on the same date, Sorrells sold one-half gallon of whiskey to R.V. Martin.[64]

During the trial, the government's principal witness, R. V. Martin, testified that he had purchased one-half gallon of whiskey from Sorrells on July 13, 1930, for five dollars. When cross-examined, Martin said that he had gone to Sorrells' home on July 13 with several acquaintances who introduced him to Sorrells. Explaining the transaction in more detail, Martin acknowledged that Sorrells produced the whiskey only after

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[61] *Id.* at 425.

[62] *Id.* at 419-20.

[63] 287 U.S. 435 (1932).

[64] United States v. Sorrells, Cr. No. 5972 (W.D.N.C. July 20, 1930).

being asked to do so three times. Martin also conceded that, after discovering that he and Sorrells had served in the same division in the First World War, he had reminisced with Sorrells about war experiences for some time. Martin agreed he was the only person to mention anything about securing liquor and that he went to Sorrells' home with the express purpose of indicting and prosecuting him for violating the National Prohibition Act.[65]

When Martin completed his testimony, the Government rested. The district judge denied Sorrells' motion to dismiss and Sorrells presented his defense. The eight defense witnesses did not deny that Sorrels sold the whiskey, but tried to establish that Martin had trapped Sorrells into the violation. E. D. Jones, the first witness for the defense, testified that he, along with Martin and two other men, visited Sorrells' home on July 13 and that he had introduced Martin to Sorrells. He admitted that Sorrells had obtained one-half gallon of whiskey for Martin but said that Sorrells had made the sale only after four or five entreaties that attempted to play on their war-time comradery. On cross-examination, Jones stated that he had never heard of Sorrells being in the liquor business and that he believed that one former war buddy would get liquor for another. The next defense witness, C. V. Stevens, testified that Sorrells' character and general reputation were good. He said that as timekeeper of the company for which Sorrells worked, he knew that Sorrells had held his job continuously without missing a payday for more than 6 years. The defense also called C. J. Synder and Fanning Lowe, the other two persons present at the sale, as witnesses. They corroborated Jones' testimony concerning the circumstances under which Sorrells had sold the whiskey to Martin. Other defense witnesses attested to Sorrells' good character and their lack of knowledge about him ever selling any liquor.[66] When these witnesses completed their testimony, the defense rested.

In rebuttal, the Government introduced evidence that, subsequent to July 13, Sorrells had sold whiskey to prohibition agents. The Government also called several witnesses who testified that Sorrells had the general reputation of being a rum runner.[67] When the government rested again, Sorrells renewed his motion to dismiss. The trial court again denied the motion, refused to give the requested entrapment instructions,[68] and gave the following charge to the jury:

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[65] Record at 7-9, Sorrells v. United States, 57 F.2d 973 (4th Cir. 1932). The Fourth Circuit's copy of the record was consulted because the district court records have been removed to the federal archives and the cost of copying the entire transcript of record would have been prohibitive.

[66] *Id.* at 9-16.

[67] *Id.* at 16-20.

[68] *Id.* at 20-21.

> [D]efendant takes the position that this evidence shows that this man was induced or entrapped to sell liquor. The court holds as a matter of law that was not the case, and the court instructs that if you believe the testimony of Mr. Martin, the witness who said he bought a half gallon from the defendant, you will convict him then [sic].[69]

The jury found Sorrells guilty, and the court sentenced him to an 18-month prison term.[70]

On appeal to the United States Court of Appeals for the Fourth Circuit, Sorrells relied primarily on his entrapment claim.[71] He contended that the evidence showed entrapment as a matter of law or, alternatively, that the evidence presented a factual question on the entrapment issue which should have been submitted to the jury under an appropriate instruction.[72] The government did not challenge the legitimacy of the entrapment defense; instead, it argued that no entrapment issue for the court or jury was present because the evidence showed without conflict that the government agent did no more than offer to buy the whiskey.[73]

A divided court affirmed Sorrells' conviction.[74] Judge Parker's majority opinion held that the district court "properly instructed the jury that there was no evidence of entrapment,"[75] and proceeded to define the entrapment doctrine much more restrictively than any other federal appellate court had done. Relying on old Supreme Court mail fraud cases[76] and an annotation published in 1893,[77] the opinion recognized the defense of entrapment

> only where, as a result of inducement, the accused is placed in the attitude of having committed a crime he did not intend to commit, or where, by reason of the consent implied in the inducement, no crime has been committed.[78]

According to the majority, the defense applied only in prosecution for

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[69] *Id.* at 21-22.

[70] *Id.* at 22.

[71] Brief for Appellant at 6-8, Sorrells v. United States, 57 F.2d 973 (4th Cir. 1932).

[72] *Id.* at 8-10. The appellant also argued that the district court had erred by admitting evidence of a later liquor sale not charged in the indictment, *id.* at 5, and that the 18 month imprisonment imposed by the trial court violated the eighth amendment's proscription against cruel and unusual punishment. *Id.* at 10-12.

[73] *Id.* at 7-9.

[74] Sorrells v. United States, 57 F.2d 973 (4th Cir. 1932).

[75] *Id.* at 974.

[76] Price v. United States, 165 U.S. 311 (1897); Andrews v. United States, 162 U.S. 420 (1896); Rosen v. United States, 161 U.S. 29 (1896); Goode v. United States, 159 U.S. 663 (1895); Grimm v. United States, 156 U.S. 604 (1895).

[77] *See* Wharton, *Note*, 10 F. 97 (1893).

[78] Sorrells v. United States, 57 F.2d 973, 974 (4th Cir. 1932).

crimes such as larceny where the victim's consent negates an essential element of the crime and in the mistaken identity cases such as *Voves v. United States*,[79] where the inducement negates any intent to violate the laws.

Acknowledging that several circuits had recognized a much broader entrapment doctrine, Judge Parker, nevertheless, refused to follow suit.[80] He also attempted to distinguish *Newman v. United States*,[81] a then-recent Fourth Circuit decision recognizing the defense of entrapment. According to his opinion,

> [the] Newman Case is authority for the proposition that the defendant there was not entitled to certain instructions on entrapment . . . but insofar as the language of the opinion goes beyond this, it is not controlling. If [*Newman*] be understood as laying down the rule that one who knowingly and intentionally violates the law, and entertains the criminal design to violate it, is to be excused . . . because [his crime] was induced by the act of an officer of the law, it goes too far, and we cannot follow it.[82]

"Many decisions," Judge Parker argued, "deal with the subject of entrapment as though the enforcement of the law were a game in which the law is to be penalized because officials do not play according to the rules." These opinions, he continued, "apply a false doctrine of entrapment based . . . on estoppel and . . . on shadowy grounds of public policy." "Neither ground," he concluded, "will withstand analysis." He rejected the estoppel argument by drawing an analogy to the rule in civil cases that the government cannot be estopped by the conduct of its

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[79] 249 F. 191 (7th Cir. 1918).

[80] Sorrells v. United States, 57 F.2d 973, 976 (4th Cir. 1932).

[81] 299 F. 128 (4th Cir. 1924).

[82] 57 F.2d at 976. It is difficult to read *Newman* in any way except as directly contrary to *Sorrells*. A jury convicted Newman, a physician, of selling morphine, but defense and prosecution testimony presented sharply divergent versions of the circumstances surrounding the offense. The trial judge gave an entrapment instruction that submitted the issue to the jury, and the Fourth Circuit approved the trial procedure:

> Under this conflicting testimony the court was right in refusing to tell the jury that they should acquit the defendant, because he was entrapped by the officer.
>
> As the issue of entrapment was vital, the defendant was entitled to an accurate statement of the law of entrapment. . . . [D]ecoys may be used to entrap crimimals, and to present opportunity to one intending or willing to commit crime. But decoys are not permissible to ensnare the innocent and law-abiding into the commission of crime. When the criminal design originates, not with the accused, but is conceived in the mind of the government officers, and the accused is by persuasion, deceitful representation, or inducement lured into the commission of a criminal act, the government is estopped by sound public policy from prosecution thereof.

Newman v. United States, 299 F. 129, 131 (4th Cir. 1924).

officers. "As for public policy argument," he said, "there is no higher public policy than that all men should obey the law."[83]

The dissenting opinion of Judge Soper stated that the court's opinion was contrary to its former decision in *Newman v. United States,* which had recognized a rule "accepted in every federal circuit."[84] He distinguished the precedents relied on by the majority with the observation that the Supreme Court "has had no occasion to say in any case before it that the accused had been improperly trapped." "It is of course true," Judge Soper wrote, "that no conduct on the part of the officers of the government can authorize or excuse a violation of the law." Nevertheless, he contended, "the government should not be allowed to prosecute a man who has been transformed from a law-abiding citizen into a criminal by the activities of its agents." When the proof established such inducement of the defendant "fair dealing demands that the prosecution shall fail."[85] Admitting that "it is likely enough that the rule of entrapment now generally accepted in other federal circuits is an extension of the law," Judge Soper stated that "the development illogical though it may be has taken place, and we should gain nothing if we should now retrace our steps."[86]

Analyzing the evidence against Sorrells, Judge Soper reasoned:

> [T]he jury might have found that the defendant had been an industrious law-abiding man, who had never violated the National Prohibition Law . . . prior to the sale charged in the indictment, and that he was overpersuaded on that occasion by the persistent requests of his former comrades in arms to leave his home and procure the liquor they desired.[87]

On the other hand, he conceded, the jury could have found that the federal agent had merely provided the defendent with a convenient opportunity to violate the law. In Judge Soper's view, this

> was not a case for peremptory instructions by the District Judge either way, if improper entrapment is a valid defense, for conflicting inferences might reasonably have been drawn from the evidence, and a question of fact for the determination of the jury was presented.[88]

After the Fourth Circuit affirmed his conviction, Sorrells petitioned the Supreme Court of the United States for a writ of certiorari. He urged

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[83] 57 F.2d at 977.

[84] *Id.* at 978 (Soper, J., dissenting).

[85] *Id.* at 979.

[86] *Id.* In support of his position, Judge Soper cited Oliver Wendell Holmes' famous maxim: "The life of the law has not been logic; it has been experience."

[87] *Id.* at 980.

[88] *Id.*

the Court to review the case because of the apparent conflict among the circuits.[89] In response, the government admitted that "if the doctrine is correctly stated in the other Circuit Courts of Appeals, the defense of entrapment in this case raised issues which should have been submitted to the jury under appropriate instructions."[90] In granting the writ, the Court limited its review to whether the evidence was sufficient to warrant submission of the entrapment issue to the jury.[91]

Relying on *Peterson v. United States*[92] and Mr. Justice Brandeis' dissent in *Casey v. United States,*[93] Sorrells contended that the government's evidence was, by itself, sufficient to establish the entrapment defense.[94] Noting that the Supreme Court had never upheld an entrapment defense, the government argued that the entrapment defense had to be pleaded as an affirmative defense and was not available on a general plea of not guilty.[95]

The Supreme Court, with only Mr. Justice Reynolds dissenting, reversed the decision of the Fourth Circuit.[96] Eight Justices agreed that entrapment was a defense recognized by federal law, but they split five to three in explaining the nature of the doctrine. Mr. Chief Justice Hughes wrote the majority opinion. After summarizing the proof presented at Sorrells' trial, the Chief Justice concluded that the evidence would support findings

> that the act for which defendant was prosecuted was instigated by the prohibition agent, that it was the creature of his purpose, that defendant had no previous disposition to commit it but was an industrious law-abiding citizen, and that the agent lured the defendant, otherwise innocent, to its commission by repeated and persistent solicitation in which he succeeded by taking advantage of the sentiment aroused by reminiscences of their experiences as companions in arms in the World War.[97]

Noting that "this Court has not spoken on the precise question," the majority pointed out that "the weight of authority in the lower

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[89] Petitioner's Brief for Certiorari at 6, Sorrells v. United States, 287 U.S. 435 (1932).

[90] Memorandum In Response to Petition for Certiorari at 8, Sorrells v. United States, 287 U.S. 435 (1932).

[91] Sorrells v. United States, *cert. granted,* 287 U.S. 584 (1932). In addition to the entrapment issue, Sorrells' counsel also sought Supreme Court review of the lower courts' rulings that similar misdeeds of the defendant committed subsequent to the charged offense were admissible in evidence against him.

[92] 255 F. 43 (9th Cir. 1919); *see* notes 18 through 20 and accompanying text *supra.*

[93] 276 U.S. 413 (1928); *see* notes 56 through 58 and accompanying text *supra.*

[94] Brief for Petitioner at 9, Sorrells v. United States, 287 U.S. 435 (1932).

[95] Brief for the Government, Sorrells v. United States, 287 U.S. 435 (1932).

[96] Sorrells v. United States, 287 U.S. 435 (1932).

[97] *Id.* at 441.

federal courts is decidedly in favor of the view that in such cases as the one before us the defense of entrapment is available." The Chief Justice then discussed objections to the doctrine raised in the opinion below—that the conduct of government agents may not estop the government and that the legislature is the final arbiter of public policy. "These arguments," he concluded, "rest entirely upon the letter of the statutes." "Literal interpretation of statutes at the expense of the reason of the law and producing absurd consequences or flagrant injustice has frequently been condemned."[98] "This established principle of statutory construction is applicable to the National Prohibition Act," the Chief Justice continued.

> We are unable to conclude that it was the intention of the Congress in enacting this statute that its processes of detection and enforcement should be abused by the instigation by government officials of an act on the part of persons otherwise innocent in order to lure them to its commission and to punish them. We are not forced by the letter to do violence to the spirit and purpose of the statute.[99]

Despite its recognition of the entrapment defense, the majority refused to sanction "the view that the Court, although treating the statute as applicable despite the entrapment, and the defendant as guilty, has authority to grant immunity, or to adopt a procedure to that end." In the Chief Justice's view, it was "the function of the court to construe the statute, not to defeat it as construed." Thus, if the statute was applicable, any correction for improper conduct by the government would have to come from the executive because "[j]udicial nullification of statutes, admittedly valid and applicable, has, happily, no place in our system." The Court's task, the majority opinion contended, was simply "to ascertain whether in the light of a plain public policy and of the proper administration of justice, conduct induced as stated should be deemed to be within [the statutory] prohibition." This approach, the opinion declared, "carries its own limitation," and, therefore, the case presented "no occasion to consider hypothetical cases of crimes so heinous or revolting that the applicable law would admit of no exceptions," because "[n]o such situation is presented here."[100]

The Chief Justice next turned to the problem of what evidence a court should permit the jury to consider when a defendant asserted an entrapment defense. He identified the controlling question as "whether the defendant is a person otherwise innocent whom the Government is seeking to punish for an alleged offense which is the product of the creative activity of its own officials." In such a case, the Court ruled,

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[98] *Id.* at 446.
[99] *Id.* at 448.
[100] *Id.* at 449-51.

> The Government . . . is in no position to object to evidence of the activities of its representatives in relation to the accused, and if the defendant seeks acquittal by reason of entrapment he cannot complain of an appropriate and searching inquiry into his own conduct and predisposition as bearing upon that issue.[101]

Finally, the Court answered the government's contention that a defendant had to plead entrapment as an affirmative defense and that he could not raise it on a plea of not guilty. The majority concluded that the defense required no special plea because "the defense, if the facts bear it out, takes the case out of the purview of the statute . . . ." The judgment was reversed, and the case remanded to the district court for further proceedings consistent with the views of the majority.[102]

Mr. Justice Roberts filed a separate opinion in which Justices Brandeis and Stone joined. The three Justices agreed that the judgment should be reversed, "but for reasons and upon grounds other than those stated in the opinion of the court."[103] Writing for the three concurring Justices, Mr. Justice Roberts defined entrapment as

> the conception and planning of an offense by an officer, and his procurement of its commission by one who would not have perpetrated it except for the trickery, persuasion, or fraud of the officer.[104]

His view of the defense called for "no distinction between crimes *mala in se* and statutory offenses of lesser gravity; requires no statutory construction, and attributes no merit to a guilty defendant . . . ." Instead, it recognized "the true foundation of the doctrine in the public policy which protects the purity of government and its processes." He criticized the majority's "new method of rationalizing the defense" as "a strained and unwarranted construction of the statute," which "amounts, in fact, to judicial amendment." Moreover, he chastised the majority for ignoring the question of "whether a similar construction will be required in the case of other or more serious crimes." The majority opinion, he stated, announced no rule "as to when a statute shall be read as excluding a case of entrapment," nor did it suggest any principle of statutory construction "which would enable us to say that it is excluded by some statutes and not by others."[105]

The correct basis of the entrapment doctrine, according to the concurring Justices, was a court's authority "to protect itself from such prostitution of the criminal law." Under their view, the question was one

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[101] *Id.* at 451.
[102] *Id.* at 452.
[103] *Id.* at 453 (Roberts, J., concurring).
[104] *Id.* at 454.
[105] *Id.* at 455-57.

for the court rather than the jury because "[t]he protection of its own functions and the preservation of the purity of its own temple belongs only to the court."[106] The minority's analysis viewed the majority's solution of submitting the case to the jury and permitting a searching inquiry into the defendant's past character as allowing the prosecution to pivot conviction in entrapment cases "not on the commission of the crime charged, but on the prior reputation or some former act or acts of the defendant not mentioned in the indictment." Therefore, although the three Justices concurred in the reversal of the judgment, they recommended remanding the case to the district court "with instructions to quash the indictment and discharge the defendant."[107]

On remand to the district court, the case of *United States v. Sorrells* came to a rather uneventful conclusion. No jury ever determined whether Sorrells was a rum runner or an ordinary citizen who procured some whiskey for a man he thought was his friend. On May 16, 1933, the district judge, apparently on the motion of the United States attorney, *nol prossed* the case, and the charges against Sorrells were dropped.[108]

After a brief flurry of case comments on the Supreme Court decision,[109] the entrapment issue, like the *Sorrells* case, slipped rapidly into obscurity. Only 14 appellate cases discussed the doctrine in the 7 years between the *Sorrells* opinion and the end of the decade, and 5 of the 14 were decided in the year following *Sorrells*.[110] Less than 10 years after the *Sorrells* decision, the author of the leading law review article on entrapment suggested that the defense was properly limited to the Na-

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[106] *Id.* at 457.

[107] *Id.* at 458-59.

[108] Letter from Verne Bartlett, Deputy Clerk of Court, United States District Court for the Western District of North Carolina, to Kenneth Mills Murchison, June 26, 1973.

[109] 13 BOSTON U.L. REV. 293 (1933); 3 DETROIT L. REV. 119 (1933); 1 GEO. WASH. L. REV. 371 (1933); 46 HARV. L. REV. 848 (1933); 31 MICH. L. REV. 1159 (1933); 17 MINN. L. REV. 331 (1933); 10 N.Y.U.L. REV. 533 (1933); 12 ORE. L. REV. 313 (1933); 1 U. CHI. L. REV. 115 (1933); 39 W. VA. L.Q. 261 (1933); 42 YALE L.J. 802 (1933). There had been two earlier notes on the Fourth Circuit opinion in the *Sorrells* case: 17 MINN. L. REV. 90 (1932); 41 YALE L.J. 1249 (1932).

[110] United States v. Ginsburg, 96 F.2d 882, 885-86 (7th Cir.), *cert. denied,* 305 U.S. 620 (1938); Ratigan v. United States, 88 F.2d 919, 922-23 (9th Cir.), *cert. denied,* 301 U.S. 705 (1937); Burke v. United States, 84 F.2d 40 (5th Cir. 1936); Yep v. United States, 83 F.2d 41 (10th Cir. 1936); Cantwell v. United States, 81 F.2d 31, 32 (9th Cir. 1935); Claiborne v. United States, 77 F.2d 682, 691 (8th Cir. 1935); Hill v. United States, 73 F.2d 223 (5th Cir. 1934); Strader v. United States, 72 F.2d 589 (10th Cir. 1934); Jindra v. United States, 69 F.2d 429, 431 (5th Cir.), *cert. denied,* 292 U.S. 651 (1934); Hankins v. United States, 67 F.2d 317 (5th Cir. 1933), *cert. denied,* 291 U.S. 671 (1934); Meyer v. United States, 67 F.2d 223 (9th Cir. 1933); Wall v. United States, 65 F.2d 993 (5th Cir. 1933); Bonnoyer v. United States, 63 F.2d 93 (1st Cir. 1933); United States v. Becker, 62 F.2d 1007 (2d Cir. 1933).

tional Prohibition Act and should therefore have passed into oblivion when the twenty-first amendment repealed the eighteenth.[111]

CONCLUSION

In the *Woo Wai*, *Peterson*, and *Voves* cases, the federal courts recognized, at least tentatively, the entrapment defense prior to the era of national prohibition. To a large extent, these early cases fashioned an equitable defense drawn from the Anglo-American legal precept that the law should brand as a criminal only a morally blameworthy individual. In all of them, the appellate opinions bristled with indignation at police officials concocting illegal schemes and then enticing individuals who they suspected, but could not prove, were criminals to join the conspiracy. Whether or not they prove the maxim that hard cases make bad law, the early cases made new law because the courts that decided them were willing to strain existing precedent to achieve just results.

Although national prohibition did not create the defense of entrapment, the evidence that the noble experiment influenced the development of the doctrine is convincing. The difficulty of enforcing prohibition, which resulted in the widespread use of informers and undercover agents, made entrapment a common defense in prohibition cases.[112] The number of cases dealing with entrapment rose dramatically after 1920, the year the eighteenth amendment went into effect, and the percentage of prohibition cases in the total rose even more dramatically.[113] After 1925, all but one of the appellate cases that actually reversed convictions involved violations of the liquor laws.[114] Moreover, repeal of the eighteenth amendment in 1933 reduced the number of entrapment opinions to an insignificant total.[115]

Judicial acceptance of entrapment closely paralleled the public attitude toward prohibition. The federal courts were extremely reluctant to recognize the defense during the early years of national prohibition, when the new amendment enjoyed widespread public support.[116] Not until significant public dissatisfaction with the amendment emerged was the defense generally accepted in prohibition cases.[117] By the end of the era of national prohibition, all of the federal circuits had acknowledged a definition of the doctrine that emphasized the origin of the

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[111] *See* Mikell, *The Doctrine of Entrapment in the Federal Courts*, 90 U. PA. L. REV. 245 (1942).

[112] See notes 4 & 29 and accompanying text *supra*.

[113] See note 29 and accompanying text *supra*.

[114] See note 43 and accompanying text *supra*.

[115] See notes 110 & 111 and accompanying text *supra*.

[116] *See* cases cited in note 29 *supra*.

[117] *See* I. FISHER, PROHIBITION AT ITS WORST (1926), and cases cited in notes 29 & 42 *supra*.

accused's criminal intent.[118] If the intent to violate the law originated with the defendant, he was guilty; if the officers of the law were responsible for the criminal intent, the defendant was entitled to an acquittal.

At least two elements of the federal entrapment doctrine made it particularly useful in prohibition cases. For one thing, the courts ruled that evidence of a defendant's prior criminal record and reputation were admissible when entrapment was raised as a defense.[119] Admitting reputation evidence limited the defense to "innocent" violators of the law, that is, those without prior criminal records. The generally accepted formulation of the entrapment defense also required submission of the question to the jury.[120] Coupled with the liberal admission of evidence about the defendant's past, the entrapment defense, in effect, submitted the general worth of the defendant to a community evaluation with the jury serving as the representative of public opinion. The courts apparently felt that an innocent citizen would be safe in the hands of his peers if he could prove his allegation of entrapment. Courts then could feel confident that they had adequately protected defendants in prohibition cases from overzealous law enforcement because community opinion no longer condemned private usage. At the same time, they avoided the necessity of committing the federal judiciary to the protection of defendants whose crimes were less socially acceptable.

The Supreme Court's role in the development of the federal entrapment defense is an apt illustration of the Court's unique position among American legal institutions. By exercising discretionary control over the cases it wished to hear, the Court ignored the creative ferment that had spread throughout the federal judiciary. It declined to take a definite position on the doctrine, despite numerous opportunities to consider the issue, until the Fourth Circuit, in the *Sorrells* case, broke the relative uniformity of federal decisions.

When the Supreme Court finally considered the question, it affirmed the existence of the defense but converted the doctrine from its original broad equitable base to a narrow question of statutory construction. National prohibition did not create the defense of entrapment in the Supreme Court anymore than it had created the defense in the circuit courts. The Court did, however, choose a prohibition case to consider the defense. Like the lower federal courts, the Supreme Court formulated a doctrine that was peculiarly appropriate for prohibition cases. Not only did the Court affirm the practices of submitting the question to the jury and allowing the prosecution to submit evidence of the defendant's prior character and criminal record, but the Court, by

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[118] See note 55 and accompanying text *supra*.

[119] See note 101 and accompanying text *supra*.

[120] See notes 46 through 52 and accompanying text *supra*.

relying on narrow principles of statutory construction, also limited the doctrine's applicability to an amendment already well on its way to repeal.[121]

The emergence of the entrapment defense is a paradigm of judicial enlargement of the law. A cynical observer might argue that the gradual development of the defense confirms the aphorism that the courts follow the election returns. The opinions, however, reflect no conscious subservience to the increasing evidence that national prohibition was unenforceable, and a more realistic assessment is that the development of the doctrine demonstrates the historicity of law as an intellectual discipline and the relativity of all legal doctrine. Perhaps more significantly, it shows that the historical forces which shape political and social affairs help determine legal issues of which the public is largely unaware, as well as legal doctrines of constitutional importance. It indicates that abstract ideals of "neutral principles" cannot, despite the best efforts of many able legal scholars, explain the way that courts will act because principles, legal or otherwise, are shaped by the realities of historical circumstance.[122]

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[121] The Supreme Court decided the *Sorrells* case on December 19, 1932; the twenty-first amendment was submitted to the states on February 20, 1933. See Sorrells v. United States, 287 U.S. 435 (1932); U.S. CONST. amend. XXI (historical note).

[122] *See* Woodward, *Reality and Social Reform: The Transition From Laissez-Faire to the Welfare State,* 72 YALE L.J. 286 (1962). For leading discussions on both sides of the "neutral principles" debate that has long divided legal scholars, *compare* Wechsler, *Toward Neutral Principles of Constitutional Law,* 73 HARV. L. REV. 1 (1959) *with* Miller & Howell, *The Myth of Neutrality in Constitutional Adjudication,* 27 U. CHI. L. REV. 661 (1960).

The text's comment on the role of neutral principles in the evolution of the entrapment defense does not, of course, challenge the value of positing moral principles as ideals towards which the law should strive. Carefully chosen values may accurately reflect and shape the political consensus that is essential for an open, egalitarian society. The point made in the text is that abstract principles can control the future development of the law only in the most general way.

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COMMENTS

TERRITORIAL RESTRICTIONS UNDER THE SHERMAN ACT: CONFUSION IN THE AFTERMATH OF *SCHWINN*

The United States Supreme Court in 1911 stated that Section 1 of the Sherman Act[1] is an "all-embracing enumeration" which condemns all contracts and combinations which unduly restrain interstate or foreign commerce.[2] The basic judicial view of the purpose of the Sherman Act was succinctly stated in *Northern Pacific Railway v. United States*:[3]

> The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions. But even were that premise open to question, the policy unequivocally laid down by the Act is competition. And to this end it prohibits "Every contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States." Although this prohibition is literally all-encompassing, the courts have construed it as precluding only those contracts or combinations which "unreasonably" restrain competition.

Despite this core of antitrust policy—that competition will generate the economic mix best suited to national requirements—it has been apparent for many years that conditions that increase competitive opportunities for one company may decrease them for another. For this reason, virtually every antitrust case which reaches the United States Supreme Court poses questions concerning the clash of one kind of competition with another. When *United States v. Arnold, Schwinn & Co.*[4] reached the Supreme Court, there was much uncertainty concerning the application of the antitrust laws to territorial and customer sale restrictions imposed between business entities. The *Schwinn* decision might seem to leave little, if any, room for lawful territorial restrictions, but areas of uncertainty still exist. The purpose of this comment is to explore these areas and the inconsistent application of Mr. Justice Fortas' language in *Schwinn*. In particular, the Fifth Circuit's recent decision in

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[1] Ch. 647, § 1, 26 Stat. 209 (1890), *as amended*, 15 U.S.C. § 1 (1970).

[2] Standard Oil Co. v. United States, 221 U.S. 1, 59-60 (1911).

[3] 356 U.S. 1, 4-5 (1958).

[4] 388 U.S. 365 (1967).

Copper Liquor, Inc. v. Adolph Coors Co.[5] is analyzed for its application of the *Schwinn* doctrine.

I. Economic Background of Territorial Restraints

Although subject to no clear-cut analysis, the American system of merchandise distribution generally involves a compromise between two simple methods. At one extreme, a producer may use his own sales force and sell directly to the customer. This course of action requires a sizable capital outlay for sales organization and warehousing plus an assumption of extensive risk. At the other extreme, a producer may sell his products outright to independent distributors and remove himself from subsequent resale decisions. This method requires less capital and risk, but the manufacturer loses control of the ultimate distribution of his product.[6]

Manufacturers rely on the theory of product differentiation in increasing the price of a given good. If a product appears to be valuable or prestigious, consumers may be willing to pay a higher price for it.[7] To protect the goodwill of the brand, a manufacturer might wish to avoid discount sales or unsatisfactory sales promotion by dealers.[8] The producer, in order to ensure use of approved marketing techniques, balances the alternatives of capital risk and no resale control and follows a middle road of vertical control, conferring complementary rights and restrictions on distributors by contract.[9] The effect of these vertical agreements on intrabrand competition is one of the most controversial issues in antitrust law.

Three general types of distribution restrictions exist. The first is the exclusive franchise—"a promise by the seller of the goods to the buyer not to sell to other outlets within the buyer's 'exclusive territory' . . . ."[10] Second, a pure territorial restriction is the buyer's promise that he will not sell the goods to customers outside a specified area. Territorial restrictions apparently must accompany exclusive franchises

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[5] 506 F.2d 934 (5th Cir. 1975).

[6] B. Bock, Antitrust Issues in Restricting Sales Territories and Outlets 7 (1967).

[7] P. Areeda, Antitrust Analysis 501 (2d ed. 1974). While suppliers tend to saturate the market with necessary products (*e.g.*, food, gasoline), they find it most profitable to distribute the higher-priced "prestigious" goods through a limited number of outlets. *See* Note, *Restricted Channels of Distribution Under the Sherman Act*, 75 Harv. L. Rev. 795, 796 (1962).

[8] *See* P. Areeda, *supra* note 7.

[9] "Vertical" relations are those at different production levels (*e.g.*, retailer-wholesaler), while "horizontal" relations are those at the same level (*e.g.*, dealer-another dealer). *See id.* at 498.

[10] Note, *supra* note 7, at 796.

since dealers are confined to their own territories.[11] The third type of contractual restriction is a promise to sell to certain classes of consumers only.[12] A territorial limitation forbidding the dealer to sell to persons outside a specified area is, of course, a restraint on the customers to whom he may sell and thus has the same effect as a nongeographic customer restriction.

Manufacturers contend that these types of restrictions are necessary to keep dealers from being forced out of business by an invasion of "cream" accounts (the best customers) by dealers from other areas. The theory is that dealers will waste their efforts fighting among themselves and will also be tempted to carry competing brands unless they are protected by a certain territorial boundary. In service-required products with high inventory turnover, the producer can plan his production and distribution requirements more efficiently if the sales areas are defined. Even more important is the fact that in quality control products (*e.g.*, perishables, trademarks), the distributor is unwilling to make the necessary capital expenditure for his facilities, and lending institutions are unwilling to extend credit to him, unless he is assured that there will be no intrabrand competition. The basic argument advanced by industry is that territorial restrictions increase interbrand competition since the dealer is compelled to concentrate on winning customers from competing brands instead of competing intrabrand dealers.[13] The counterargument is that by holding out a closed territory as an inducement for potential dealers to handle his product, a manufacturer is attracting the dealers' efforts away from the sale of a more competitively distributed brand of the same product.[14]

II. Legal Development of the Rules Concerning Territorial Restrictions

A. The Per Se and Rule of Reason Distinction

Although Section 1 of the Sherman Act literally proscribes *every* contract in restraint of trade, the courts have construed it as precluding only those agreements which "unreasonably" restrain competition. Mr. Justice White's rule of reason test announced in *Standard Oil Co. v. United States*[15] is a case-by-case inquiry into the reasonableness of the marketing practice involved. It focuses on behavior, acknowledging the

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[11] *Id.*

[12] *Id.*

[13] *See generally id.* at 809-17, 827-29.

[14] *See* Stone, *Closed Territorial Distribution: An Opening Question in the Sherman Act*, 30 U. Chi. L. Rev. 286, 315 (1963).

[15] 221 U.S. 1 (1911).

possible diversity of economic effects produced by different kinds of restraint. The classic rationale for the rule of reason was stated by Mr. Justice Brandeis:

> [T]he legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.[16]

Factors considered under the rule of reason when determining whether or not a restraint is suppressing competition include market share,[17] degree of product differentiation,[18] restraint enforcement,[19] motives underlying the conduct,[20] conduct of the parties before and after restraint,[21] availability of competing goods to dealers,[22] effect on interbrand competition,[23] effect of eliminating the restraint,[24] availability of less restrictive alternatives,[25] whether restrictions are ancillary to price fixing,[26] barriers to nonmember firms,[27] and positive effect on economic efficiency.[28] The number of factors scrutinized before a given practice is or is not adjudged reasonable varies from case to case.[29]

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[16] Board of Trade v. United States, 246 U.S. 231, 238 (1918).

[17] *See* United States v. National Lead Co., 332 U.S. 319, 352 (1947); Carter-Wallace, Inc. v. United States, 449 F.2d 1374, 1381 (Ct. Cl. 1971).

[18] *See* Sandura Co. v. FTC, 339 F.2d 847, 851-53 (6th Cir. 1964).

[19] *See* United States v. Arnold, Schwinn & Co., 388 U.S. 365, 372 (1967).

[20] Carter-Wallace, Inc. v. United States, 449 F.2d 1374, 1381 (Ct. Cl. 1971).

[21] *See* Standard Oil Co. v. United States, 221 U.S. 1, 75-76 (1911).

[22] *See* Top-All Varieties, Inc. v. Hallmark Cards, Inc., 301 F. Supp. 703, 705 (S.D.N.Y. 1969).

[23] *See* White Motor Co. v. United States, 372 U.S. 253, 261-64 (1963)(discussion of "tying arrangements").

[24] *See id.* at 257.

[25] *See* Sandura Co. v. FTC, 339 F.2d 847, 856 (6th Cir. 1964).

[26] *See* United States v. Sealy, Inc., 388 U.S. 350, 354-57 (1967).

[27] *See* Associated Press v. United States, 326 U.S. 1, 11-15 (1944).

[28] *See* Carter-Wallace, Inc. v. United States, 449 F.2d 1374, 1381 (Ct. Cl. 1971).

[29] *See id.*

Various marketing practices exist which, due to their "pernicious effect on competition,"[30] are deemed to be unreasonable as a matter of law. For these business agreements, the courts have traced a circular pattern from the rule of reason to the abstract rule of per se unreasonableness, thereby avoiding a complicated inquiry into the economic factors involved in each case. Among the practices which the courts have considered to be inherently unlawful are price fixing among competitors,[31] tying arrangements,[32] division of markets,[33] collective horizontal refusals to deal (group boycotts),[34] and group action to coerce outside parties.[35] Vertical agreements between a manufacturer or producer and retailers which fix resale prices stifle price competition among retailers and have long been held to be per se violations in the absence of fair trade laws.[36]

B. The Doctrine of Ancillary Restraints

As early as 1711 it was recognized that only unreasonable restraints are prohibited and that restrictions could be justified if ancillary to a legitimate business purpose and if limited in time and space.[37] While the English courts upheld even "naked" restraints not ancillary to otherwise lawful transactions,[38] American courts have been less hospitable to these type restraints. This doctrine of ancillary restraints was read into the jurisprudence of the Sherman Act by Judge Taft, who, in *United States v. Addyston Pipe & Steel Co.*,[39] suggested a theory of efficiencies for taking agreements out of the per se proscription. The example given in that case was an agreement by partners that its members not compete against the partnership. Since the purpose of the agreement was "ancillary to the main end of the union,"[40] it was upheld. At least one writer has suggested that since the main purpose of the partnership agreement was efficiency, this standard takes agreements not to compete out of the

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[30] Northern Pac. Ry. v. United States, 356 U.S. 1, 5 (1958).

[31] United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940); United States v. Trenton Potteries Co., 273 U.S. 392 (1927).

[32] International Salt Co. v. United States, 332 U.S. 392 (1947).

[33] United States v. Addyston Pipe & Steel Co., 85 F. 271 (6th Cir. 1898), *aff'd,* 175 U.S. 211 (1899).

[34] Fashion Originators' Guild of America, Inc. v. FTC, 312 U.S. 457 (1941).

[35] Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959).

[36] Albrecht v. Herald Co., 390 U.S. 145 (1968); United States v. Parke, Davis & Co., 362 U.S. 29 (1960); Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911); Lehrman v. Gulf Oil Corp., 464 F.2d 26 (5th Cir.), *cert. denied,* 409 U.S. 1077 (1972).

[37] Mitchel v. Reynolds, 24 Eng. Rep. 347 (Ch. 1711).

[38] P. AREEDA, *supra* note 7, at 42.

[39] 85 F. 271 (6th Cir. 1898).

[40] *Id.* at 280.

per se category and places them in the rule of reason classification.[41] The doctrine of ancillary restraints, however, has not been considered a controlling test in recent per se decisions.[42]

C. Schwinn *and its Progenitors*

Neither the Justice Department nor the Schwinn Company could derive comfort from earlier decisions on territorial restrictions since they merely evidenced the Court's uncertainty about the protection of competition in fact and in theory. These decisions are presented chronologically to illuminate the business issues underpinning vertical and horizontal territorial restraints and to indicate future applications of *Schwinn*.

1. *White Motor Co. v. United States*[43]

The Department of Justice alleged White Motor Company violated the Sherman Act by allocating exclusive territories to distributors of its heavy-duty trucks and by establishing the prices at which they should be resold. The government argued that these exclusive territorial restrictions were tantamount to distributor agreements to divide territories and, as such, were per se violations. White Motor Company, urging that its restrictions on intrabrand competition were necessary to protect dealers engaging in interbrand competition, contended that the intrabrand practices should be tested under the rule of reason. The Supreme Court found that more information was needed about vertical territorial limitations and the economic and business conditions which foster them in order to make an appropriate decision.[44] The Court, refusing to adopt the per se argument, reversed the district court's grant of summary judgment for the United States and held that "the legality of the territorial and customer limitations should be determined only after a trial."[45] The Court's holding implies the application of a rule of reason

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[41] *See* Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 75 YALE L.J. 373, 380-84 (1966).

[42] *See, e.g.*, United States v. Arnold, Schwinn & Co., 388 U.S. 365, 391-92 (1967) (Stewart, J., concurring and dissenting); Carter-Wallace, Inc. v. United States, 449 F.2d 1374, 1381 (Ct. Cl. 1971).

[43] 372 U.S. 253 (1963).

[44] We need to know more than we do about the actual impact of these arrangements on competition to decide whether they have such a "pernicious effect on competition and lack . . . any redeeming virtue" and therefore should be classified as *per se* violations of the Sherman Act.

Id. at 263 (citation omitted).

[45] *Id.* at 264.

test. The trial deemed necessary by the Court would involve an investigation into all the circumstances which brought about the restrictions in question.[46] In a concurring opinion, Mr. Justice Brennan noted that territorial limitations bore a "superficial resemblance" to other per se violations but did not discuss the fact that the purpose of such restraints may be to facilitate price fixing.[47]

2. *Snap-On Tools Corp. v. FTC*[48]

Snap-On Tools was a manufacturer and distributor of hand tools whose buyers consisted of mechanics and small repair shops. In 1951, Snap-On Tools discontinued direct selling and began distributing through franchised dealers who resold from mobile trucks covering assigned routes. The dealers contracted not to sell outside their territory but could sell to and service foreign customers who came to them.[49] The United States Court of Appeals for the Seventh Circuit, in a 2 to 1 decision, set aside an FTC order prohibiting the use of the geographic resale agreements. The court felt that the intrabrand limitations strengthened Snap-On Tools' dealers for interbrand war.[50]

3. *Sandura Co. v. FTC*[51]

Sandura was a manufacturer of vinyl floor covering that had encountered major financial setbacks while developing a new product. To remedy this situation, Sandura initiated a new campaign, the crucial aspect of which was keeping the company's dealers from encroaching upon each other's territories. The United States Court of Appeals for the Sixth Circuit held that, in the face of these problems, Sandura was justified in adopting a closed territory system since the business would have failed without it.[52] As in *Snap-On Tools,* the court felt that the

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[46] *See, e.g.*, United States v. Arnold, Schwinn & Co., 388 U.S. 365, 385-86 (1967).

[47] *See* 372 U.S. at 267-68 (Brennan, J., concurring).

[48] 321 F.2d 825 (7th Cir. 1963).

[49] Thus, no customer restriction was involved. *See* text accompanying note 12 *supra*.

[50] [W]e believe manufacturers should be encouraged by the workings of the antitrust laws to meet and promote competition of their products with those of competing brands, rather than to be hampered by those laws in the "orderly marketing of [their] products."

321 F.2d at 833. An oral understanding reserving the largest customers for the company was considered *de minimis* since sound business practice would not allow small dealers to handle the largest accounts. *Id.* at 836.

[51] 339 F.2d 847 (6th Cir. 1964).

[52] *Id.* at 857. Sandura was not a "failing company," an exception to the per se test later expressed in *Schwinn. Id.* at 855-56.

elimination of these intrabrand territorial restraints would impede rather than promote competition.

These three cases left open the question of whether territorial restrictions enforced vertically by an individual producer were subject to per se rules by applying the rule of reason test, at least arguably, in each case. The extent to which a seller could contractually hold dealers to specific territories in the absence of specialized conditions where the restrictions benefited competition,[53] remained unclear.

4. *United States v. Arnold, Schwinn & Co.*[54]

The landmark *Schwinn* decision raised the basic question of whether there is any difference for antitrust purposes between the control a manufacturer can exercise over the distribution of his product after he *sells* outright and the control he may exercise by using dealers as his agents. In an effort to reverse its downward sales trend, Schwinn de-emphasized bicycle sales to retailers through consignment arrangements with distributors by promoting the "Schwinn Plan."[55] Sales under this plan involved direct shipments to franchised retailers, with Schwinn "invoicing the dealers, extending credit, and paying a commission to the distributor taking the order."[56] Schwinn assigned specified territories to each of its distributors, who were instructed, under a pure territorial restriction, to distribute only to franchised retailers in their respective territories. The sanction for selling outside these limits was franchise cancellation.[57] Under the "Schwinn Plan," since sales were direct to the retailers, the bicycle distributors were not required to invest in warehouse facilities and inventory or to incur freight and insurance costs. Schwinn supervised its marketing system, but since the distributors were essentially manufacturer's representatives, Schwinn carried the risks to the point where the retailer took title.[58]

Schwinn's contentions presented a confrontation with the Depart-

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[53] *Compare* White Motor Co. v. United States, 372 U.S. 253 (1963), Sandura Co. v. FTC, 339 F.2d 847 (6th Cir. 1964), *and* Snap-On Tools Corp. v. FTC, 321 F.2d 825 (7th Cir. 1963) *with* United States v. General Motors Corp., 384 U.S. 127 (1966). In *General Motors,* Chevrolet dealers cooperated with their manufacturer in preventing other franchised dealers from selling to discounters. Although this plan included many vertical aspects, the Court found a classic group boycott situation enforcing a customer restriction. *See* United States v. General Motors Corp., 384 U.S. 127, 145-48 (1966).

[54] 388 U.S. 365 (1967).

[55] *Id.* at 370 & n.3.

[56] *Id.* at 370.

[57] The franchised dealers were also to purchase only from a distributor in that particular area. *Id.* at 370-71.

[58] *See* United States v. Arnold, Schwinn & Co., 237 F. Supp. 323, 327-28 (N.D. Ill. 1965), *rev'd,* 388 U.S. 365 (1967).

ment of Justice's view that intrabrand competition is required by the antitrust laws to the same extent as interbrand competition. Rather than arguing that the "Schwinn Plan" was a per se violation, the Justice Department contended that the territorial restrictions should fall under the rule of reason on the ground that mere differences in contractual relations do not change the economic facts of competition suppression. Schwinn contended that its system would promote, not restrain, its sagging competition with other brands and was required for the viable existence of its distributors. Schwinn maintained that if it were forced to give up its system, it would have to integrate the selling function and thereby eliminate the franchises.[59]

Mr. Justice Fortas, employing a rule of reason analysis, noted the conditions which would justify territorial restrictions. These included the "newcomer" exception based on a desire to break into a business, and the "failing company" exception based on a desire to stay in a business.[60] The Court further conditioned any Sherman Act violation upon the "firm and resolute"[61] enforcement of territorial or customer restrictions. This qualification, however, appears to be a finding by the Court that there was a vertical agreement in fact.[62] The Court then drew the crucial distinction between

> the situation where the manufacturer parts with title, dominion, or risk with respect to the article, and where he completely retains ownership and risk of loss. . . . [W]here a manufacturer *sells* products to his distributor subject to territorial restrictions upon resale, a *per se* violation of the Sherman Act results.[63]

The rule of reason would nevertheless apply in a case where a manufacturer retains risk of loss because

> we are not prepared to introduce the inflexibility which a *per se* rule might bring if it were applied to prohibit all vertical restrictions of territory and all franchising . . . .[64]

The majority in this manner refused to adopt the positions of either the Justice Department or Schwinn, and instead adopted a middle course by applying a per se test to territorial and customer allocations *after* sale of a product only. The "Schwinn Plan" came under the rule of reason

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[59] *See* B. Bock, *supra* note 6, at 17-19, *citing* Brief for Schwinn Cycle Distrib. Ass'n at 59-61.

[60] 388 U.S. at 374.

[61] *Id.* at 372.

[62] *See* notes 112 through 123 and accompanying text *infra*.

[63] 388 U.S. at 378-79 (emphasis in original).

[64] *Id.*

since risk and dominion were not passed to the dealers. The Court's holding indicated that intrabrand competition is not always required under the Sherman Act.[65]

While agreeing with the majority that the "Schwinn Plan" should be tested in terms of its competitive effect, Mr. Justice Stewart disagreed that sales and consignments should be subjected to different rules.[66] His dissent,[67] which cited the doctrine of ancillary restraints, argued that the appellation of a particular manufacturer-distributor arrangement as a "sale" or as an "agency" should not be determinative, since they have similar effects in the market place.[68]

Mr. Justice Fortas' analysis—utilizing the rule of reason in the first part of the opinion[69] and a per se approach in the latter[70]—has lead to inconsistency in lower court interpretations and has subjected *Schwinn* to criticism.[71] It is important to note what was *not* at issue in *Schwinn*. The case was not concerned with agreements among competitors on a horizontal level. Nor was it a case contaminated with price fixing, which would have constituted a per se violation.[72] In addition, the Court did not consider whether evidence of resale price maintenance would "fatally infect" vertical restrictions.[73] Despite *Schwinn's* per se language, the rule of reason has probably not been removed from the law concerning territorial restrictions.[74]

D. The Coors *Opinion*

Speculation concerning the application of *Schwinn* is well illus-

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[65] B. Bock, *supra* note 6, at 27.

[66] *See* 388 U.S. at 382 (Stewart, J., concurring and dissenting).

[67] Justice Harlan joined in this opinion.

[68] *See* 388 U.S. at 391-94. Professor Bork posits that naked agreements eliminating competition which have no efficiency-adding purpose are per se illegal, while agreements "ançillary" to efficiency are valid if they pass the rule of reason muster. This theory utilizes Taft's doctrine of ancillary restraints. See text accompanying notes 37 through 42 *supra*. *See* Bork, *supra* note 41, at 380-84. Professor Comanor proposes that all vertical territorial allocations had economic product differentiation goals similar to those directly formed through resale price maintenance. Comanor, *Vertical Territorial and Customer Restrictions:* White Motor *and its Aftermath,* 81 Harv. L. Rev. 1419 (1968).

Neither Bork nor Comanor support the *Schwinn* sale/consignment distinction; they believe that it is irrelevant to the fundamental question of the effect of the restriction on competition.

[69] 388 U.S. at 372-75.

[70] *Id.* at 379-80.

[71] *See* Note, *Territorial and Customer Restrictions: A Trend Toward a Broader Rule of Reason?*, 40 Geo. Wash. L. Rev. 123 (1971); note 68 *supra*.

[72] 388 U.S. at 372-73.

[73] *Id.* at 373.

[74] Note, *supra* note 71, at 130-31.

trated by a recent Fifth Circuit decision, *Copper Liquor, Inc. v. Adolph Coors Co.*[75] Coors, one of the United States' largest brewers of beer, is noted for its efforts to uphold the "prestige" of its product. Coors' brewing technique differs from the methods employed by other brewers in several respects. Among the more significant differences, for the purposes of this comment, are refrigeration and rotation of stock, so that beer of a certain age is removed from the market. Coors' distributors and retailers are urged to keep the beer refrigerated and to make substantial efforts to limit its exposure to heat, light, and agitation, since these factors may adversely affect flavor. Coors' distributors, thus, have many responsibilities in upholding the company's quality control standards.[76] To implement these controls effectively, Coors imposes vertical territorial restrictions upon its distributors, reserving the right to change the territory or designate additional dealers for the same territory.[77]

In the *Coors* case, the plaintiff, a retail liquor store owner, brought an antitrust action against the Coors brewery after the distributor in that area ceased delivering Coors beer to him.[78] These deliveries were terminated after the plaintiff offered Coors to the public at a discount. Coors maintained that it had no power to direct its distributors in dealing with retailers and that any refusal to deal was unilaterally instituted by the distributors. Mr. Coors testified that the company only tried to persuade retailers not to sell at a discount for inventory control purposes,[79] but there was evidence that distributorships had been terminated for selling to discounting retailers.[80] This evidence constituted the basis for the court's determination that the territorial restrictions were designed to maintain retail price levels as well as control quality.

The United States Court of Appeals for the Fifth Circuit followed a circuitous route in applying the antitrust law to these facts. At first glance, the court appears to apply the *Schwinn* per se rule of illegality since Coors had *sold* products to its distributors subject to territorial restrictions upon resale.[81] The court stated that the United States Su-

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[75] 506 F.2d 934 (5th Cir. 1975).

[76] *See generally id.* at 936-38.

[77] The relevant part of the distributor's contract provides:

> While this agreement is in effect the distributor will conduct the business of the wholesale distribution of Coors beer in the above territory only and will do so aggressively in a manner satisfactory to the Company.

Brief for Appellant at 23, Copper Liquor, Inc. v. Adolph Coors Co., 506 F.2d 934 (5th Cir. 1975).

[78] 506 F.2d at 936.

[79] *Id.* at 939.

[80] *Id.* at 946.

[81] While it was clear that Coors *sold* beer to its distributors, Coors argued that it maintained "responsibility" and thus never relinquished "risk, dominion and control"

preme Court had intensified its per se proscription of territorial restrictions in *United States v. Topco Associates, Inc.*[82] *Topco*, however, involved *horizontal* restraints which were not a part of the *Schwinn* holding.[83] The *Coors* court reviewed a variety of interpretations of *Schwinn*[84] but found them unavailing because under a *rule of reason* analysis,

> [a]ny justification of restrictions on the ground of special techniques for manufacturing . . . should be premised on the absence of less restrictive means to assure the same control over quality.[85]

Yet, throughout the court's apparent application of *Schwinn* is the finding that the restraints were closely intertwined with price fixing.[86] The case was remanded on the issue of damages.

III. Case Interpretations of *Schwinn* Avoiding Per Se Results and Their Relation to *Coors*

The following decisions, some of which were cited by the *Coors* court, demonstrate the variety of exceptions read into the *Schwinn* per se rule.

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under the *Schwinn* test. Brief for Appellant at 27. The court ignored this contention in its opinion.

[82] 405 U.S. 596 (1972).

[83] "[I]t is clear that the restraint in this case is a horizontal one, and, therefore, a *per se* violation of § 1." *Id.* at 608. In his dissent in *Topco*, Mr. Chief Justice Burger noted that *Schwinn* was inapplicable since it did not involve a horizontal restraint and that *Schwinn* applied the rule of reason to vertical restraints. *Id.* at 618. The Fifth Circuit did note that the restraints in *Topco* "had strong vertical aspects as well." Copper Liquor, Inc. v. Adolph Coors Co., 506 F.2d 934, 943 (5th Cir. 1975).

[84] *Coors* recognized that *Schwinn* was subject to criticism, citing *inter alia*, Comanor, *supra* note 68. 506 F.2d at 941 n.5, 945. The Comanor article, however, discusses why the *Schwinn* sale/agency dichotomy is *meaningless*, not *how* to apply the test.

Coors inexplicably did not rely on Hensley Equip. Co. v. Esco Corp., 383 F.2d 252 (5th Cir. 1967), which the trial court had considered a controlling precedent. *Hensley* involved a patent misuse defense based upon a license agreement restricting the resale of the patent only for original installation on equipment manufactured by a certain company. The court applied *Schwinn* since the patentee had parted with dominion but noted that the *Hensley* facts were distinguishable because the customer restriction confined access of the patent to dealers selected by a third party. It appears that the *Coors* court did not cite *Hensley* as controlling authority because it was an aberration of patent law.

[85] 506 F.2d at 945.

[86] *See id.* at 944-48. A *pure* territorial restriction as in *Schwinn* is to be distinguished from a territorial restriction "ancillary" to a price-fixing scheme as was present in *Coors*. The *Coors* court found that the distributors would lose their territorial protection *unless* they upheld the company's no-discount pricing policy. *See id.* at 939-40, 946-47.

A. *The "Firm and Resolute" Restraint Requisite*

1. *Janel Sales Corp. v. Lanvin Parfums, Inc.*[87]

The validity of agreements between Lanvin and several New York retailers was brought into issue in this decision. These agreements included resale price maintenance—retailers were not to sell below stipulated minimum prices—and customer restrictions—retailers were to sell to consumers for use only. On appeal, the United States Court of Appeals for the Second Circuit applied the per se standard to the price maintenance provisions but held that the jury's consideration of the reasonableness of the customer restrictions was proper. Since there was conflicting testimony, the question of enforcement was allowed to go to the jury. The court noted that "the existence of such a contractual clause does not necessarily imply a *per se* violation."[88] *Schwinn* was distinguished since Mr. Justice Fortas' equivocal rule of reason language premised the finding of a per se violation on the fact that the manufacturer is "firm and resolute" in insisting on compliance with the restriction.[89]

2. *Colorado Pump & Supply Co. v. Febco, Inc.*[90]

A distributor who lost his 50 percent direct-from-manufacturer discount complained that the territorial restriction of another distributor violated the *Schwinn* per se test since title had passed from manufacturer to distributor. The facts, however, indicated that the contract authorized the distributor to sell within the described territory but did not forbid sales outside his territory. The United States Court of Appeals for the Tenth Circuit followed *Janel* by predicating its holding on the "firm and resolute" insistence on compliance. Distinguishing *Colorado Pump* as a "far cry" from the facts considered in *Schwinn,* the court saw the lack of *authorization* to sell outside the prescribed territory as no more than a "primary marketing territory" provision, not a per se violation.[91] If *Coors* had been argued before the Tenth Circuit,

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[87] 396 F.2d 398 (2d Cir.), *cert. denied,* 393 U.S. 938 (1968).

[88] *Id.* at 406.

[89] *Id.* Although *Janel* is a customer restriction case, the holding applies *Schwinn* equally to territorial and customer restraints.

[90] 472 F.2d 637 (10th Cir.), *cert. denied,* 411 U.S. 987 (1973).

[91] *Id.* at 639. Under a system of "primary marketing responsibility," the dealer is required to represent the supplier adequately in the assigned area, but is not prohibited from selling outside the assigned area. Mr. Justice Brennan in *White Motor* referred to these covenants as being "less restrictive" than closed territory arrangements. 372 U.S. at 271-72 n.12; *see* Plastic Packaging Materials, Inc. v. Dow Chem. Co., 327 F. Supp. 213 (E.D. Pa. 1971) (area of primary marketing responsibility without more is not per se

it would appear that its restriction would also be considered an area of primary responsibility provision, and, as such, would not pass the "firm and resolute" test.

B. *Nature of the Product Exceptions*

1. *Tripoli Co. v. Wella Corp.*[92]

Tripoli represents a very narrow reading of *Schwinn*. Tripoli was a long standing distributor of beauty shop supplies who had distributed products for the Wella Corporation under an agreement which included a customer restraint restricting resale to beauticians and barbers. Wella terminated the contract when it learned that Tripoli was selling directly to consumers. Tripoli sued, arguing that the prohibition on sales to consumers violated the sale/agency per se rule of *Schwinn*. Wella contended that the restrictions were in the *public* interest, since its products differed from retail beauty supplies in usage and chemical composition and since their misuse could cause injury. The United States Court of Appeals for the Third Circuit affirmed the summary judgment for Wella, noting that these restrictions were reasonably necessary since serious injury could result without application by properly trained personnel. The court based its interpretation of *Schwinn* on the language that "it is unreasonable *without more* for a manufacturer to seek to restrict and confine areas of persons with whom an article may be traded after the manufacturer has parted with dominion over it."[93] In *Tripoli there was more* because the purpose of the restraints was to confine the product to professional use, not to limit Tripoli to a certain territory.[94] The restriction passed the rule of reason test suggested in *Schwinn*: No attempt had been made to shelter the product from intrabrand competition, and interbrand competition was available to the distributors. As *Coors* noted, *Tripoli* presents a tempting exception to the per se rule that would apply broadly to products which could injure the public as the result of damage or misuse in distribution. The *Coors* court implied, however, that the *Tripoli* exception should only apply to *dangerous* products.[95]

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violation); *cf.* National Dairy Prod. Corp. v. Milk Drivers Local 680, 308 F. Supp. 982 (S.D.N.Y. 1970) (court required by agreement to eliminate competition to apply per se rule); Interphoto Corp. v. Minolta Corp., 295 F. Supp. 711, 720, 723 (S.D.N.Y.), *aff'd*, 417 F.2d 621 (2d Cir. 1969)(mere contract provision does not trigger per se violation).

[92] 425 F.2d 932 (3d Cir.), *cert. denied*, 400 U.S. 831 (1970).

[93] *Id.* at 936 (emphasis in original), *citing* United States v. Arnold, Schwinn & Co., 388 U.S. 365, 379 (1967).

[94] 425 F.2d at 936.

[95] *See* Copper Liquor, Inc. v. Adolph Coors Co., 506 F.2d 934, 944 (5th Cir. 1975),

2. *United States v. Jerrold Electronics*[96]

This case was cited by *Coors* as being analogous to the *Tripoli* exception, but it is a classic illustration of the "newcomer" exception to *Schwinn*. In *Jerrold* a manufacturer of community television antenna equipment required contracts for services accompanying each sale. The government did not object to the reasonableness of the contracts but to their compulsory nature.[97] The *Jerrold* court, nevertheless, did not feel that the per se test[98] should be applied in view of the "unique circumstances," noting that "an injustice would be done by blindly accepting the per se rule."[99] That conclusion was based primarily on the fact that the restriction was instituted in the launching of a new business with a highly uncertain future. A rash of equipment malfunctions at the outset of the enterprise would have destroyed the new industry.[100] Though neither Coors nor Schwinn were newcomers or failing companies, *Schwinn*'s approval of these rule of reason "exceptions"[101] places the per se test in considerable doubt.

3. *Carter-Wallace, Inc. v. United States*[102]

This opinion represents an application of *Tripoli* that would all but destroy the *Schwinn* per se test. The plaintiff's patent infringement suit against the government was answered with claims of patent misuse by antitrust violation. The agreements in question permitted licensees to resell the patented drug only in combination with certain other drugs. Even though this case involved tying provisions and not territorial restrictions, the government cited *Schwinn* for the proposition that plaintiff had restricted free use and alienation of the product after he had sold it. The United States Court of Claims surprisingly applied *Tripoli* even though the facts were quite different, noting that *Tripoli*

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citing United States v. Safey First Prod. Corp., 1972 Trade Cas. 74, 223 (S.D.N.Y. 1972) (fire protection systems resold only to trained persons).

[96] 187 F. Supp. 545 (E.D. Pa. 1960), *aff'd mem.*, 365 U.S. 567 (1961).

[97] *Id.* at 554.

[98] The court noted that under Northern Pac. Ry. v. United States, 356 U.S. 1 (1958), tying agreements are per se unreasonable if the supplier has sufficient economic power over the tying product. 187 F. Supp. at 554.

[99] *Id.* at 556.

[100] The court indicated that when the industry expanded, the justification for the tie-ins would disappear, and the per se test could again be applied. *Id.* at 557.

[101] The other "exception" recognized by *Schwinn* is the "failing company doctrine." 388 U.S. at 374. *See also* Worthen Bank & Trust Co. v. National BankAmericard, Inc., 485 F.2d 119 (8th Cir. 1973)(Justice Department recommended that the rule of reason be applied to group boycott due to new entrant situation).

[102] 449 F.2d 1374 (Ct. Cl. 1971).

had found *Schwinn* applicable only to its particular facts. Although the government argued that the *Tripoli* public protection factor was not present in *Carter-Wallace,* the court boldly stated:

> [T]he *Tripoli* court, embarking on a "rule-of-reason" analysis after and cognizant of *Schwinn,* thought that the Supreme Court's opinion did not automatically outlaw any and all post-sale restrictions. Indeed, the restrictions in *Tripoli* were much stronger and more burdensome than the readily avoidable limitation involved here.[103]

The Court of Claims thus interpreted *Tripoli* as requiring a rule of reason analysis for *all* vertical restraints. It could be argued that this case is an aberration of patent law were it not for the fact that the court explicitly stated that it was "treating the drug as if it were unpatented."[104]

4. *LaFortune v. Ebie*[105]

In its brief, Coors persuasively cited *LaFortune,*[106] which demonstrated how lightly lower courts have applied the per se rule to territorial restraints. In *LaFortune*, the legality of a Chicken Delight territorial franchise was placed in issue as a defense to an intentional franchise interference action. The Second District Court of Appeals for California interpreted its state antitrust law[107] *in pari materia* with the Sherman Act and remanded the case for a trial on the rule of reason factors.

> It is possible that relevant factual distinctions between the food service industry and the bicycle industry in *Schwinn* may justify exclusivity of territory for delivery of product. For example, speed of delivery, *quality of product,* and condition of product at time of delivery may be factors which under the rule of reason could justify restraints of trade that would be unreasonable in the marketing of a standardized manufactured appliance. . . . These issues cannot be resolved on appeal . . . .[108]

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[103] *Id.* at 1380.

[104] *Id.* at 1382.

> We have no occasion, therefore, to consider the mooted issue of whether there are exceptions for patented goods from the coverage of the doctrine relating to post-sale restrictions as enumerated in Schwinn . . . .

Id.

[105] 26 Cal. App. 3d 72, 102 Cal. Rptr. 588 (2d Dist. Ct. App. 1972).

[106] Brief for Appellant at 26, Copper Liquor, Inc. v. Adolph Coors Co., 506 F.2d 934 (5th Cir. 1975).

[107] CAL. BUS. & PROF. CODE §§ 16600, 16720, 16726 (West 1964).

[108] 26 Cal. App. 3d at 75-76, 102 Cal. Rptr. at 590 (emphasis added)(citing *White Motor*) (citations omitted).

Coors suggested that *Tripoli, LaFortune*, and *Carter-Wallace* together can be read as exceptions to *Schwinn* based on the nature of the product involved.[109] The brewery argued that due to the lack of preservatives in its beer, territorial restrictions necessitating a minimization of inventory time come under the "quality control" factor of the rule of reason test in *LaFortune*.[110] The court admitted that Coors made a good argument that marketing techniques are necessary for quality control, but unlike the court in *LaFortune*, the *Coors* court saw the possibility of less restrictive alternatives as fatal to this restraint, which, of course, indicates a rule of reason analysis.[111]

C. *Simple Refusal to Deal as a Defense to* Schwinn: *The* Colgate *Doctrine*

Perhaps the single most litigated issue in cases interpreting the antitrust laws is the existence or nonexistence of a vertical agreement. The courts have developed an interplay between the per se rules determining when an agreement is unreasonable and the rules determining if indeed there is an agreement. As the per se rules become broader and more prohibitive, judges may be persuaded to soften the blow by finding that there is no vertical agreement. *United States v. Colgate & Co.*[112] and the subsequent decisions that narrow it[113] have been particularly confusing in this area. The general principle established in *Colgate* is that a businessman is free to refuse to deal with any present or potential supplier or customer.

> In the absence of any purpose to create or maintain a monopoly, the [Sherman Act] does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal. And, of course, he may announce in advance the circumstances under which he will refuse to sell.[114]

Coors argued that the unilateral refusal to deal rule shields the conduct

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[109] Brief for Appellant at 25-26, Copper Liquor, Inc. v. Adolph Coors Co., 506 F.2d 934 (5th Cir. 1975).

[110] *See id.* at 26-27.

[111] "There is many a whiskey the quality of which is allegedly based on springwater and close monitoring by the manufacturer." 506 F.2d at 945.

For a broad interpretation of the *Schwinn* per se language, see United States v. Glaxo Group Ltd., 302 F. Supp. 1 (D.D.C. 1969).

[112] 250 U.S. 300 (1919).

[113] See note 116 *infra*.

[114] 250 U.S. at 307. *But see* Poster Exch., Inc. v. National Screen Serv. Corp., 362 F.2d 571 (5th Cir. 1966)(refusals to deal in an effort to monopolize are illegal).

of its *distributor* in terminating sales to the retailer, insisting that it has no influence over retailers at the brewery level. The leading case limiting the scope of *Colgate—United States v. Parke, Davis & Co.*[115]—showed, however, the reluctance of the courts to allow two-party conduct that would be unlawful when effected by express written agreement.[116] Practically speaking, for a policy such as resale price maintenance to become commercially successful, a manufacturer must communicate the policy to his customers and identify by standard those violators with whom he will stop dealing in the future if they do not comply. Parke, Davis & Co. was not content to announce a suggested retail price followed with a simple refusal to deal, but instead used the wholesaler level to enforce its price-fixing policy upon the retailer.

> The retailers who disregarded the price policy were promptly cut off when Parke Davis supplied the wholesalers with their names. . . . In thus involving the wholesalers to stop the flow of Parke Davis products to the retailers, thereby inducing retailers' adherence to its suggested retail prices, Parke Davis created a combination with the retailers and the wholesalers to maintain retail prices and violated the Sherman Act.[117]

Parke, Davis involved a per se unreasonable practice of price fixing, but the matter litigated was whether or not there was a vertical agreement. Coors lost on this issue since the court found that a jury could reasonably conclude from the facts that the distributors felt "constrained to enforce Coors's suggested retail prices."[118] Thus Coors' argument that its distributor's action was within the ambit of *Colgate* failed due to a finding of a vertical agreement to enforce a per se unreasonable restraint—price fixing.

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[115] 362 U.S. 29 (1960).

[116] *Parke, Davis* was based on a line of *Colgate*-limiting cases. Frey & Son, Inc. v. Cudahy Packing Co., 256 U.S. 208 (1921), upheld a sales plan between wholesalers and jobbers fixing minimum resale price to retailers. In FTC v. Beech-Nut Packing Co., 257 U.S. 441 (1922), Beech-Nut implemented its policy of resale price maintenance by refusing to sell to wholesalers who sold to nonadhering retailers. The Court found this to be an unlawful vertical combination, thus limiting the *Colgate* doctrine. *Beech-Nut* was clearly upheld in United States v. Bausch & Lomb Optical Co., 321 U.S. 707 (1944), which involved a customer restriction imposed on the wholesaler and a price fixing agreement between retailers and defendant. The Court's language about customer restraints in *Bausch* is not conclusive, however, since the system of resale price maintenance was enmeshed with the restrictions. The Federal Trade Commission distinguished *Bausch* from a customer restriction case, *In re* Roux Distrib. Co., 55 F.T.C. 1386 (1959). *White Motor* also interpreted the *Bausch* per se test as condemning those customer limitations ancillary to or supporting resale price maintenance. White Motor Co. v. United States, 372 U.S. 253, 260 (1963).

[117] 362 U.S. 29, 45 (1960).

[118] 506 F.2d 934, 946 (5th Cir. 1975).

Far from burying *Colgate,* the *Schwinn* court suggested that *Colgate* is a limitation on the rule of reason,[119] but *Schwinn* narrows *Colgate* by describing another test for determining *when* there is a vertical agreement. The "firm and resolute" test constitutes a finding by the court that there was a vertical agreement. For example, in *Schwinn*, the bicycle manufacturer had gone beyond a unilateral refusal to deal. Schwinn's firmness was evidenced by the "communicated danger of termination," although there was no finding of actual termination. This apparently established a more narrow test of Sherman Act conspiracy.[120] *Coors* confuses this language, treating the "firm and resolute" test as an "exception" to *Schwinn*[121] when it is actually the preliminary requisite of finding a *vertical agreement in fact*. Later in the *Coors* opinion, Judge Wisdom ruled that there were facts of actual and threatened termination of distributorships to bring the practices "within the per se proscription of *Parke, Davis.*"[122] Yet the reason that *Parke, Davis* was per se illegal was because it involved resale price maintenance, not because there was a vertical agreement in fact.[123]

IV. The Wrong Test Applied in *Coors*

In *Coors*, the court stated that the essence of Coors' territorial restriction was resale price maintenance, which is a per se violation under *Parke, Davis*. Even after finding the presence of a vertical restraint in fact under the "firm and resolute" rationale, the court concluded: "Coors's restraints were ancillary to an illegal price fixing scheme."[124] The *Schwinn* test does not involve price fixing, but instead a pure territorial restriction—clearly not presented in *Coors*. In this regard, Judge Gee's concurring opinion is illuminating:

> [H]aving decided that . . . the vertically-imposed territorial restrictions were ancillary to price-fixing and that the restrictions thus were illegal per se, [I would] *stop*. "In those situations, it is needless to inquire further into competitive effect because it is established doctrine that unless permitted by statute, the fixing of prices at which others may sell is anti-competitive, and the unlawfulness of the price fixing infects the distribution restrictions." United States v. Arnold, Schwinn

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[119] *See* 388 U.S. 365, 373-76 (1967).

[120] 388 U.S. at 372; *see* P. Areeda, *supra* note 7, at 559-60.

Colgate is a narrow test that a manufacturer must meet with facts of "such Doric simplicity as to be somewhat rare in this day of complex business enterprise." George W. Warner & Co. v. Black & Decker Mfg. Co., 277 F.2d 787, 790 (2d Cir. 1960).

[121] 506 F.2d. at 944.

[122] *Id.* at 947.

[123] *See* United States v. Parke, Davis & Co., 362 U.S. 29, 45 (1960).

[124] 506 F.2d at 948.

> & Co. [at 375-76]. Discussion of issues which might be raised in a pure territorial-allocation case is *unnecessary* to our decision.[125]

The *Schwinn* per se syllogism was unnecessary dicta in *Coors*. The proper precedent to dispose of the price-fixing restraint would have been *United States v. Sealy, Inc.*[126] (suggested by *Schwinn*) or the *Parke, Davis* case alone. While *Parke, Davis* was a pure resale price maintenance case, *Sealy* involved exclusive territorial licenses that policed a system of retail price fixing, free from the danger of competition from other territories. The "connection" of the restriction with the unlawful price fixing was enough to require that the arrangement be unlawful per se.[127]

V. Business Alternatives After *Coors*

Despite the Fifth Circuit's holding in *Coors*, the Adolph Coors Company continues to impose territorial restrictions on its distributors. This imposition is based on an order of the Federal Trade Commission, as corrected by the Tenth Circuit,[128] which allows territorial restrictions in those states in which state law requires them. Such state laws[129] (based on revenue policy) appear to be a major distinguishing factor from the *Schwinn* holding, and yet the Fifth Circuit inexplicably ignored this proposition.[130]

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[125] *Id.* at 955 (emphasis added).

[126] 388 U.S. 350 (1967). Sealy's mutually exclusive territorial allocation consisted of agreements by the trademark owner not to license any other person in the designated area and by the licensees not to sell "Sealy products" outside the designated area. Although Mr. Justice Fortas classified the arrangements as *horizontal* restraints, it was the relationship with unlawful price fixing that disposed of the territorial restrictions. For this reason, *Sealy* would apply to vertical as well as horizontal restraints, making it a proper precedent for *Coors*.

Schwinn also cited United States v. Bausch & Lomb Co., 321 U.S. 707 (1944), as a price-fixing per se case. 388 U.S. at 373.

[127] 388 U.S. at 356-57.

[128] Adolph Coors Co. v. FTC, 497 F.2d 1178 (10th Cir. 1974). The Tenth Circuit found substantial evidence to support findings of price-fixing agreements between Coors and its distributors and applied *Schwinn* to the vertical restraints. But the court expressed a desire that the Supreme Court make an exception to the per se rule "when the product is unique and where the manufacturer can justify its territorial restraints under the rule of reason." *Id.* at 1187. The Fifth Circuit in *Coors*, pointed out that such an exception would engulf the per se rule of *Schwinn*. Copper Liquors, Inc. v. Adolph Coors Co., 506 F.2d 934, 947 (5th Cir. 1975).

[129] *E.g.*, Miss. Code Ann. § 67-1-41 (1972); Texas Penal Code art. 666-3, -53 (1952).

[130] The Coors Company argued that the liquor industry is distinguishable from the facts in *Schwinn* because of the federal and state controls over the areas in which a distributor may operate. Federal and state statutes prohibit the distributor from selling in "dry" counties and proscribe the consignment method of liquor distribution in order

Under the *Schwinn* rules, distributors who purchase are required to operate without territorial franchise protection. Unless a supplier comes under one of the "exceptions" of the rule of reason, he must decide between selling outright or retaining title and the right to set standards for resale. Left open is the question of whether an original manufacturer retains title and risk when there is a vertical restriction in fact.[131] But what was the role of the specific facts in *Schwinn* and how far can they be generalized? Courts have constructed several exceptions to the harsh *Schwinn* doctrine, which indicates a trend back to the rule of reason in vertical territorial restriction situations. This trend may open more flexible alternatives to manufacturers in the distribution of their product.

In all of the territorial restriction cases defended by the Coors Company, the necessary link of price fixing to the restriction has always been present.[132] The holding in *Coors* suggests that if a simple territorial restriction—which involved no price fixing—were presented to the Fifth Circuit, that court would apply the rule of reason. In any event, the *Coors* decision and the antitrust analysis therein indicate the uncertainty currently existing in the territorial restraint area. Resolution of this doubt can only have positive effects in the business and judicial communities.

Robert Dudley Davidson

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to control tax and license revenue. Of course, this factor could only be considered under the rule of reason, and the *Coors* opinion does not mention it, although the court does explore other contentions by the appellant. Brief for Appellant at 27-28, Copper Liquor, Inc. v. Adolph Coors Co., 506 F.2d 934 (5th Cir. 1975); *see* Black v. Magnolia Liquor Co., 355 U.S. 24 (1957) (purpose of Federal Alcohol Administration Act, 27 U.S.C. §§ 201 *et seq.* (1970), is to prohibit practices "analogous" to the Sherman Act).

[131] *See* B. BOCK, *supra* note 6, at 31-39.

[132] Letter from Leo N. Bradley to Robert Davidson, August 22, 1975, on file with *MISSISSIPPI LAW JOURNAL*, referring to territorial cases tried by Bradley, Campbell & Carney, of Golden, Colorado.

STOPPING AND QUESTIONING SUSPECTED SHOPLIFTERS WITHOUT CREATING CIVIL LIABILITY

The consumer and his emergence as a protected species under the law have seemingly cornered the market of legal writing about business recently.[1] To a large degree the retail merchant trying to locate "his" portion of the new laws has been relegated to assuming the role of the consumer's shadow. What the consumer can demand, the merchant must give; what the consumer may refuse to do or give, the merchant cannot require. For example, since an at-home buyer is statutorily guaranteed a 3-day "cooling off period" in which to cancel a purchase resulting from a home solicitation sale, the merchant-seller must wait 3 days before regarding the sale as completed.[2] Apart from these areas of consumer law, however, which inherently seem to require legal advice, there is one class of problem "consumer" about which the attorney can offer tangible, useful advice to the retailer. This class, the shoplifter, is one type of "consumer" not protected by any new laws, whose consumption of retail merchandise is illegal, and whose increasing presence poisons the profits of the retail merchant. Each of his acts, taken alone, normally does not represent a large percentage of profits lost by the retail merchant,[3] but when viewed on a nation-wide or even store-wide basis the economic impact is substantial. The attorney seeking to provide his client comprehensive service thus needs to know the law encircling this class of problem patrons. Successfully capturing a shoplifter is important to the merchant. In addition to regaining the shirt, the necklace, the hammer, the blender, or the sugar, the retailer armed with accurate advice can actually stop and detain a suspected shoplifter, determine that the shopper is innocent, and still escape any civil liability. Mishandled, however, this confrontation between merchant and innocent shoplifter can result in a costly lawsuit to the retailer. As stated by one major chain store security chief, "One suit for false arrest can wipe out the savings achieved through good security."[4] The discussion of this problem—how to handle a suspected shoplifter, and how not to—is the

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[1] *See generally* PRACTICING LAW INSTITUTE, CONSUMER CREDIT 1974 (1974); Henley & Culver, *Representing the Plaintiff in Consumer Cases*, 35 ALA. LAW. 304 (1974); Jeffries, *Protection for Consumers Against Unfair and Deceptive Business*, 57 MARQ. L. REV. 559 (1974); McCall, *Due Process and Consumer Protection: Concepts and Realities in Procedure and Substance—Repossession and Adhesion Contract Issues*, 26 HAST. L.J. 383 (1974); *Symposium—The Developing Law of Consumer Protection*, 10 GONZOGA L. REV. 319 (1975). The Attorney General of Mississippi has prepared a pamphlet containing selected Mississippi statutes, Mississippi's Laws on Consumer Protection, Fraud and Deceptive Practices, which is available through that office.

[2] MISS. CODE ANN. § 75-66-3 (1972). *See also* Comment, *An Analysis of Mississippi's Cooling-Off Legislation*, 46 MISS. L.J. 461 (1975).

[3] *See* Note, *The Merchant, The Shoplifter and the Law*, 55 MINN. L. REV. 825 (1971).

[4] NEWSWEEK, Sept. 23, 1974, at 80.

subject of this comment, which, though not couched as a polemic, is nevertheless offered as an aid to the attorney who counsels retailer clients.

I. Shoplifting

The crime of shoplifting plagues the retail merchant. According to the National Retail Merchants Association, more than 4.8 billion dollars worth of goods are shoplifted each year from the nation's stores.[5] Not fatalistically, but simply realistically, retailers anticipate and write off anywhere from 1 or 2 percent to 10 percent yearly for inventory shrinkage.[6] The culprits come in all shapes, sizes, ages, colors, and sexes, and they come often, since the average theft is of relatively small worth. One study reported, for example, that of more than 1,600 randomly selected shoppers entering four eastern department stores, 1 in 15 stole merchandise of an average worth of $5.26.[7] To combat such thievery retailers employ a host of security and detective devices, from closed circuit television cameras to floorwalkers, from small magnetic price tags to large wall signs promising prosecution to the shoplifter—the few who get caught.[8] When a shopper is suspected of shoplifting, it is not surprising that the store wants him questioned, even though the "haul" might be worth only a few dollars, for there is little sense in waiting for the major offender while ten minor ones walk out the door. Nor is it surprising to find an innocent patron offended, embarrassed, and angry, when stopped and questioned. From such a confrontation a lawsuit is likely to be born. Under the common law, the merchant or his employee who acted in good faith, but who was wrong, was in trouble.

A. Common Law

At common law if one saw another person wrongfully taking his goods, he was allowed to retake the goods, using reasonable force if necessary.[9] A mistake on the part of the merchant, however, or the

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[5] *Id.* at 79.

[6] The 10 percent figure was cited as realistic by a store forced into bankruptcy partly because of shoplifting losses. Bus. Week, Dec. 23, 1967, at 20.

Theft by employees and allowance for miscounting of inventory may also be included within the category "inventory shrinkage" (an accounting term which represents the difference between the value of the merchandise stores have on the shelves and what the books say they should have).

[7] S. Astor, Study of 1,647 Customers Show 1 in 15 is a Shoplifter (1970), *cited in* Donnell & Peacock, *Statutory Encouragement of Merchant Efforts to Apprehend Shoplifters*, 10 Am. Bus. L.J. 151 n.1 (1972).

[8] The Astor study, S. Astor, *supra* note 7, states that of the 109 observed shoplifters only 1 was apprehended.

[9] Donnell v. Great Atl. & Pac. Tea Co., 229 Ala. 320, 156 So. 844 (1934). *See also* Annot., 47 A.L.R.3d 998, 1004 (1973).

subsequent inability to prove what was suspected, could result in liability.[10] An apology, even a sincere one, was inadequate to prevent the cause of action. The torts most commonly pleaded were false imprisonment, false arrest, slander, malicious prosecution, and assault and battery.[11] Thus, under the common law the merchant walked a narrow line between the two distinct consequences of his actions—if he was right he regained his goods; if he was wrong, he faced a possible lawsuit and tort liability. While businessmen often cry out for simplicity in the law, this state of affairs was considered too simple. In 1958 the Mississippi Legislature, like many other state legislatures before and after,[12] agreed, and enacted legislation subsequently codified as sections 97-23-45 to -53 of the 1972 Mississippi Code[13] which, in essence, allowed the merchant to make an honest mistake.

B. The Mississippi Statutes

Section 97-23-45 defines shoplifting and makes it a crime.[14] Section 97-23-47, now amended, announces the penalties.[15] Section 97-23-49 establishes the concealment of goods as prima facie evidence of having committed the crime.[16] Section 97-23-53 simply states that this crime is in addition to and supplemental to any other existing crimes.[17] Section 97-23-51 is the important one. It provides:

> If any person shall commit or attempt to commit the offense of shoplifting, as defined herein, or if any person shall wilfully conceal upon his person or otherwise any unpurchased goods, wares or merchandise held or owned by any store or mercantile establishment, the merchant or any employee thereof or any peace or police officer, acting in good faith

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[10] *See generally* 32 AM. JUR. 2d *False Imprisonment* § 74 (1967).

[11] For an excellent discussion of these torts as theories for suits arising from merchant-shopper confrontations, see Donnell & Peacock, *supra* note 7, at 154-60.

[12] *See* Comment, *Shoplifting Law: Constitutional Ramifications of Merchant Detention Statutes*, 1 HOFSTRA L. REV. 295, 312-13 (1973).

[13] MISS. CODE ANN. §§ 97-23-45 to -53 (1972) were originally enacted as Miss. Laws of 1958, ch. 268, §§ 1-5, and first codified as MISS. CODE ANN. §§ 2374-01 to -05 (Supp. 1972). MISS. CODE ANN. § 97-23-47 (1972) has been superseded by MISS. CODE ANN. § 97-23-47 (Supp. 1975). This change will be discussed in part I *E infra*.

[14] MISS. CODE ANN. § 97-23-45 (1972) provides:

> Any person who shall wilfully and unlawfully take possession of any goods, wares or merchandise owned or held by and offered or displayed for sale by any store or other mercantile establishment with the intention and purpose of converting such goods, wares or merchandise to his own use without paying the purchase price therefor shall be guilty of the crime of shoplifting and, upon conviction, shall be punished as is provided in section 97-23-47.

[15] *Id.* § 97-23-47 (Supp. 1975). See part I *E infra*.

[16] *Id.* § 97-23-49 (1972).

[17] *Id.* § 97-23-53.

> and upon probable cause based upon reasonable grounds therefor, may question such person, in a reasonable manner for the purpose of ascertaining whether or not such person is guilty of shoplifting as defined herein. Such questioning of a person by a merchant, merchant's employee or peace or police officer shall not render such merchant, merchant's employee or peace or police officer civilly liable for slander, false arrest, false imprisonment, malicious prosecution, unlawful detention or otherwise in any case where such merchant, merchant's employee or peace or police officer acts in good faith and upon reasonable grounds to believe that the person questioned is committing or attempting to commit the crime of shoplifting as defined in section 97-23-45, Mississippi Code of 1972.[18]

Actual guilt is no longer the crucial determination upon which liability depends. The significant query becomes whether or not the merchant acted "in good faith and upon probable cause based upon reasonable grounds therefor." Once this test is met, the investigation must still be conducted in a "reasonable manner."

C. Mississippi Case Law

Obviously the combination of the terms "good faith," "probable cause," "reasonable grounds," and "reasonable manner" permits a wide range of possible case-by-case determinations by judges and juries. The Mississippi Supreme Court has drawn some helpful lines of demarcation concerning what constitutes improper conduct on the part of the merchant or his employee. Unfortunately the three cases construing section 97-23-51 have not clearly indicated to the retailer what the court considers fault-proof grounds for apprehension, guaranteed to come within the auspices of "probable cause." Nor does the case law positively delineate an approved method and manner of conducting the detention investigation.

The Mississippi Supreme Court construed section 97-23-51 in three cases: *J.C. Penney Co. v. Cox*,[19] *Southwest Drug Stores, Inc. v. Garner*,[20] and *Butler v. W.E. Walker Stores, Inc.*[21] In *Butler* the court stated that *J.C. Penney* and *Southwest Drug Stores* "give a complete interpretation to this statute."[22] Though all three cases, at least in part, held favorably for the store patron and against the retail merchant, they are helpful in establishing some concrete touchstones, some readily understandable limits of behavior within which the retailer and his employee must remain.

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[18] *Id.* § 97-23-51.

[19] 246 Miss. 1, 148 So. 2d 679 (1963).

[20] 195 So. 2d 837 (Miss. 1967).

[21] 222 So. 2d 128 (Miss. 1969).

[22] *Id.* at 130.

1. *J.C. Penney Co. v. Cox*

J.C. Penney involved a shopper's action for false imprisonment based upon her detention by an assistant store manager who accused her of shoplifting a jar of deodorant. Testimony revealed that no one saw Mrs. Cox take anything. One saleslady did feel that Mrs. Cox was acting "a little suspicious[ly]."[23] Another person in the store told the saleslady: "I think she put something in her bag."[24] All of this was related to a different clerk who in turn told the assistant manager, who in turn found Mrs. Cox at the steps within the store, caught her by the arm, and in full view of the personnel and customers demanded that she pay him for the deodorant she had stolen. He further demanded that she open her purse and her bag and empty their contents onto the steps, which she did. Finding nothing incriminating, the assistant manager then admitted that he had made a mistake.

Applying section 97-23-51 for the first time, the Mississippi Supreme Court held that (1) the employee was not acting in good faith upon probable cause based upon reasonable grounds and that (2) the questioning was not handled in a reasonable manner. Recognizing that the statute gave the employee a qualified privilege to act yet remain immune from suit, the court found that the privilege had been exceeded.[25] Addressing the question of probable cause the court noted:

> Probable cause cannot be based on mere belief of a third person that somebody did or did not do something. . . . The investigation should be *based on more than mere conjecture or suspicion.* It must be grounded on some definite information from some person that saw enough to justify the manager's belief that a theft had been made, and that a person was guilty of shoplifting.[26]

The court placed the burden of proving the appropriateness of applying the qualified privilege as a defense squarely upon the retailer.

> The burden of proof is on the one who asserts the right to accost a customer to show sufficient evidence that the accused person willfully concealed upon his person or otherwise any unpurchased goods or merchandise owned by the mercantile establishment.[27]

The method of detention used in *J.C. Penney* was also declared unreasonable. The scene of the store patron being forced to empty her purse and bag on the store steps in full view of clerks and customers led

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[23] 246 Miss. at 6, 148 So. 2d at 682.

[24] *Id.*

[25] *Id.* at 12, 148 So. 2d at 684. For a discussion of qualified privilege in libel and slander cases, see 18 MISS. L.J. 319 (1947).

[26] 246 Miss. at 11, 148 So. 2d at 684 (emphasis added).

[27] *Id.* at 12, 148 So. 2d at 684.

the court to announce that "the qualified privilege under the statute does not give the merchant the right to embarrass or harass individuals suspected, in public view of every one, in a rude manner."[28] Finally, while recognizing that "[p]ilfering . . . from large retail stores presents a serious problem for the management of such establishments,"[29] and declaring that "[o]ur attitude toward the management in this matter has therefore been lenient rather than harsh,"[30] the court upheld the jury verdict of $2,000 as not excessive in this action for false imprisonment and slander.

2. *Southwest Drug Stores, Inc. v. Garner*

In *Southwest Drug Stores*,[31] the court again found that a store manager had exceeded his qualified privilege and therefore affirmed the verdict against him framed as an action for slander and unlawful detention. In this case Mrs. Garner had asked the manager for help in finding a bar of soap. The manager asked one of the salesladies to help her. They found the soap, and Mrs. Garner paid for it, receiving a sales ticket and the soap placed in a small paper bag, and walked out of the store. Before reaching her car she was apprehended by the manager who called to her in a rude and loud manner, "You stole a bar of soap."[32] The court found two decisive errors in the manager's conduct: (1) By not asking the cashier whether the patron had paid for her merchandise, the manager was "careless and negligent in his method of ascertaining"[33] what actually had taken place; and (2) instead of inquiring in a reasonable manner the manager blatantly accused her of stealing the bar of soap. The decision implies that for either mistake, the manager exceeded the privilege of section 97-23-51.

Southwest Drug Stores also clarified a confusing statement found in *J.C. Penney* regarding whether or not the existence of probable cause is a question of law or of fact. *J.C. Penney* had stated that it is a question of law, but in *Southwest Drug Stores*, the court said that probable cause "is a mixed question of law and fact. 'In general, if the evidence is uncontroverted, the question of reasonable or probable cause . . . is one of law for the court. If the evidence conflicts, the question . . . is one of fact for the jury . . . .' "[34] *J.C. Penney* fit the former situation; *Southwest Drug Stores*, the latter. Mrs. Garner received

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[28] *Id.* at 13, 148 So. 2d at 685.
[29] *Id.*
[30] *Id.*
[31] 195 So. 2d 837 (Miss. 1967).
[32] *Id.* at 839.
[33] *Id.* at 840.
[34] *Id.* at 841, *citing* 35 C.J.S. *False Imprisonment* § 59 (1960).

$8,000. While realizing that this verdict was "large",[35] the court upheld it, commenting that the jury would have inferred malice and inflicted punitive damages.

3. *Butler v. W.E. Walker Stores, Inc.*

The third and latest case interpreting section 97-23-51 is *Butler v. W.E. Walker Stores, Inc.*[36] The evidence, centering around alleged shoplifting of lipstick, was in sharp conflict. Following *J.C. Penney*, the court found error in the circuit court's refusal to grant an instruction that the burden of proof was upon the store to prove application of the qualified privilege. Also in error was the granting of an instruction for the defendant that the shopper's acts were "such as would tend to arouse the suspicion of a reasonable person," with *J.C. Penney* being cited as authority that more than suspicion is required to create probable cause. The court stressed that "the manager must act upon probable cause, of which he is not the final judge, and thus act as his peril."[37] The lower court was reversed and the case remanded.

The above three cases, then, constitute Mississippi's case law on section 97-23-51. They indicate what will not be considered probable cause to detain a shopper and what will not constitute investigation in a reasonable manner.[38] Yet what about the other side of the coin? What conduct on the part of a shopper seen by an employee will constitute probable cause to detain and investigate? How does an employee "reasonably" question a person suspected of shoplifting? *Scott-Burr Stores Corp. v. Edgar*[39] may be the most persuasive Mississippi case which can be offered to answer these questions even though it was decided prior to the enactment of section 97-23-51.

4. *Scott-Burr Stores Corp. v. Edgar*

This case's efficacy rests in the fact that in both *J.C. Penney* and *Southwest Drug Stores* the court felt the need to distinguish it. The latter noted that in "[*Scott-Burr Stores*] probable cause existed."[40] In

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[35] *Id.* at 842.

[36] 222 So. 2d 128 (Miss. 1969).

[37] *Id.* at 130.

[38] For an excellent examination of situations in other jurisdictions where the courts have held either (a) that as a matter of law the circumstances did not present probable cause for detention, or (b) that the jury could reasonably have found that probable cause did not exist to justify detention, see 47 A.L.R.3d 998, § 8(a), (b), at 1013 (1973). For a collection of circumstances insufficient to show that the detention was carried out in a "reasonable manner," see *id.* § 10(a), (b), at 1018.

[39] 181 Miss. 486, 177 So. 766 (1938).

[40] 195 So. 2d 837, 841-42 (1967).

Scott-Burr Stores the shopper, Mr. Edgar, went to buy some razor blades for a friend. He approached the appropriate counter and picked up some blades which were attached to a small card. Realizing that he forgot to ask his friend whether he wanted single- or double-edged blades, he placed the blades and the card back on the counter. He then put his hand underneath his sweater to put some matches in his shirt pocket. Three saleswomen, who were near the counter and who saw what occurred, believed "in good faith"[41] that the blades were being pocketed. The blades could not be found on the counter when Edgar started to leave the store, and the incident was reported to the manager. The manager followed Edgar out of the store, stopped him, and asked him to follow him back to the rear of the store behind a luncheonette counter, before he accused him. In both *J.C. Penney*[42] and *Southwest Drug Stores*[43] the court indicates that here the manager both had probable cause and questioned the suspect in a reasonable manner.

As previously mentioned, *J.C. Penney, Southwest Drug Stores*, and *Butler* constitute the entire body of Mississippi Supreme Court case law on section 97-23-51. Reading these cases only for their verdicts, one might assume that Mississippi's highest court is determined to interpret the statute's standards of reasonableness and reasonable grounds conservatively, giving more weight to the rights of the shopper than to the rights of the shopkeeper. In fact, the three decisions are frequently cited as red flags to merchants contemplating detentions.[44] *J.C. Penney* and *Southwest Drug Stores* are more properly viewed as reflections of unreasonable actions by store managers which exceed the qualified privilege offered under section 97-23-51, rather than as adamant pro-shopper, anti-shopkeeper manifestos on the part of the court. Had *Scott-Burr Stores* been decided after the enactment of section 97-23-51, the result would more than likely have been the same. In fact, it would have been even easier to reach.

D. Other Jurisdictions

While the Mississippi Supreme Court declared in *Butler* that *J.C. Penney* and *Southwest Drug Stores* "give a complete interpretation"[45] to section 97-23-51, a brief survey of some favorable findings for merchants in other jurisdictions may prove helpful to the attorney advising and defending the retailer. *Rothstein v. Jackson's of Coral Gables, Inc.*[46]

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[41] 181 Miss. 486, 501, 177 So. 766, 769 (1938).

[42] J.C. Penney v. Cox, 246 Miss. 1, 12, 148 So. 2d 679, 684-85 (1963).

[43] Southwest Drug Stores, Inc. v. Garner, 195 So. 2d 837, 841-42 (Miss. 1967).

[44] *See, e.g.*, 47 A.L.R.3d 998 (1973); 17 S.C.L. Rev. 729 (1965); 50 N.C.L. Rev. 188 (1972).

[45] Butler v. W.E. Walker Stores, Inc., 222 So. 2d 128, 130 (Miss. 1969).

[46] 133 So. 2d 331 (Fla. 1961).

presented circumstances which led a Florida court to conclude, as a matter of law, that a store employee had probable cause to believe that goods were being shoplifted. In *Rothstein* the plaintiff had taken an article of merchandise, had placed it around her waist, and had proceeded to move away from the rack where the merchandise belonged. In an Oregon case,[47] undisputed evidence established that the customer picked up a package of dye, later put it in her jacket pocket, and at the checkout counter failed to declare and pay for the dye. The court found, as a matter of law, reasonable cause to detain, even though conflicting testimony existed as to whether the dye was partially or completely concealed.[48] Upholding a jury's finding of reasonableness, a Georgia court determined that where a customer entered the store with a small yellow tape measure for the purpose of measuring picture frames, and a store manager saw her put the tape measure in her pocket, but mistook it for a roll of price tags and thus requested the store detective to apprehend the shopper, the manager acted upon reasonable grounds.[49] Under circumstances similar to *Scott-Burr Stores*, an Ohio court found that asking a customer to step over to a counter of the store before questioning her constituted questioning in a "reasonable manner,"[50] and a New Jersey decision held that a detention for 30 minutes was not for an unreasonable length of time.[51] Certainly these few selected examples will not cover every new fact situation arising in Mississippi. The area of probable cause and reasonableness is by nature a case-by-case determination.[52] These examples do show, hopefully, that Mississippi attorneys may find helpful decisions in other jurisdictions, and, more importantly, each of the above examples seems to reach the same conclusion that the Mississippi Supreme Court would reach were it faced with balancing these same competing interests of the merchant and the customer.

E. Comparing the Consequences: For Shoplifting—For Mishandling the Detention

1. Criminal Penalties for Shoplifting

In 1975 the Mississippi Legislature amended section 97-23-47[53]

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[47] Delp v. Zapp's Drug & Variety Stores, 238 Ore. 538, 395 P.2d 137 (1964).

[48] *Id.* at 140.

[49] S.S. Kresge Co. v. Carty, 120 Ga. App. 170, 169 S.E.2d 735 (1969).

[50] Mullins v. Rinks, Inc., 27 Ohio App. 2d 45, 272 N.E.2d 152 (1971).

[51] Cooke v. J.J. Newberry & Co., 96 N.J. Super. 9, 232 A.2d 425 (1967).

[52] For a collection of cases, see 35 C.J.S. *False Imprisonment* § 25 (1960).

[53] The prior statute adopted in 1958 read:

(a) Any person committing the first offense of shoplifting when the value of the goods, wares or merchandise taken is less than twenty-five dollars ($25.00) shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not less than twenty-five dollars ($25.00) nor more than three

which defines the penalties for shoplifting. The amendment accomplished three basic changes: (1) It is now a misdemeanor to shoplift goods which have a value of less than $100, and it is a felony to shoplift goods which have a value of $100 or more. The previous distinguishing amount was $25. (2) The amended statute alters the increased penalties (*i.e.*, larger fines and/or longer jail terms) for subsequent offenses. Under the previous statute, upon the commission of a third or subsequent

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hundred dollars ($300.00), or by imprisonment in the county jail for a term of not less than five (5) days nor more than six (6) months, or by both such fine and imprisonment in the discretion of the court.

(b) Upon commission of a second offense when the value of the goods, wares or merchandise taken is less than twenty-five dollars ($25.00) the person committing the same shall be guilty of a misdemeanor and, upon conviction, shall be punished by a fine of not less than fifty dollars ($50.00) nor more than five hundred dollars ($500.00) or by imprisonment in the county jail for a term of not less than thirty (30) days nor more than one (1) year, or by both such fine and imprisonment in the discretion of the court.

(c) Upon commission of a third or any subsequent offense, regardless of the value of the goods, wares or merchandise taken, the person committing same shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment in the state penitentiary for a term of not less than one (1) nor more than five (5) years.

(d) When the value of the goods, wares or merchandise taken shall be twenty-five dollars ($25.00), or more any person who shall commit the offense of shoplifting, whether same shall be a first or subsequent offense, shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment in the state penitentiary for a term of not less than one (1) nor more than five (5) years.

Miss. Code § 2374-02 (1942); Miss. Gen. Laws, 1958, ch. 268, § 2.

The 1975 amended statute provides:

(1) Any person committing the first offense of shoplifting when the value of the goods, wares or merchandise taken is less than one hundred dollars ($100.00), shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not less than twenty-five dollars ($25.00) nor more than three hundred dollars ($300.00), or by imprisonment in the county jail for a term of not less than five (5) days nor more than six (6) months, or by both such fine and imprisonment in the discretion of the court.

(2) Upon commission of a second or any subsequent offense when the value of the goods, wares or merchandise taken is less than one hundred dollars ($100.00), the person committing same shall be guilty of a misdemeanor and, upon conviction, shall be punished by a fine of not less than fifty dollars ($50.00) nor more than five hundred dollars ($500.00) or by imprisonment in the county jail for a term of not less than thirty (30) days nor more than one (1) year, or by both such fine and imprisonment in the discretion of the court.

(3) When the value of the goods, wares or merchandise taken shall be one hundred dollars ($100.00) or more, any person who shall commit the offense of shoplifting shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment in the state penitentiary for a term of not exceeding five (5) years; or shall be fined not more than one thousand dollars ($1,000.00), or both.

offense, the shoplifter was guilty of a felony, regardless of the amount involved. Now a person may shoplift up to $99.99 at a time, forever, and still be guilty only of a misdemeanor. (3) The previous penalty upon conviction for a felony was imprisonment in the state penitentiary for a term of not less than 1 year nor more than 5 years. The amended statute strikes out the minimum 1-year sentence while retaining the 5-year maximum and offers an alternative to any imprisonment—a fine of not more than $1,000. A fine may be levied in addition to imprisonment.

Taken collectively, the changes seem to suggest a more lenient attitude toward the shoplifter with less expensive taste. Why? Although "inflation" may seem, at first, to be a facetious answer, it probably does explain the change. According to one authority,[54] some city prosecutors requested the change in amount because juries, perhaps feeling that a theft of goods worth $25 was not enough to send a person to prison, were not producing enough guilty verdicts. Another explanation is "consistency." In 1971 the crime of petit larceny was redefined, changing the crucial amount stolen from $25 to $100.[55] Likewise the amount distinguishing first and second offense bad check felonies from bad check misdemeanors has been increased from $25 to $100.[56] Thus a first offender who shoplifted a $50 item faced a tougher penalty upon conviction than his counterpart who "bought" it with a bad check. Perhaps in striving to make these crimes equally attractive, section 97-23-47 was amended by the legislature. While the third change does create a potentially higher maximum punishment for the convicted felonious shoplifter, who may now receive 5 years and a $1,000 fine, the omission of the mandatory 1-year prison term seems to take more bite out than the possible fine puts in.[57]

2. The Merchant's Liability for Damages

Without a statute limiting the amount of damages which may be awarded, no certain figure can be predicted. In *J.C. Penney* and *Southwest Drug Stores*, the Mississippi Supreme Court affirmed verdicts in the amounts of $2,000[58] and $8,000[59] respectively. In *J.C. Penney*

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[54] Interview with Aaron S. Condon, Professor of Law, University of Mississippi Law Center. Professor Condon was a district attorney for 6 years.

[55] The $25 figure of Miss. Gen. Laws of 1940, ch. 238, § 1 was increased to $100 by Miss. Gen. Laws of 1966, ch. 360, § 1, and is now codified as MISS. CODE ANN. § 97-17-43 (1972).

[56] The $25 figure of Miss. Gen. Laws of 1950, ch. 316, § 1 was increased to $100 by Miss. Gen. Laws of 1972, ch. 476, § 6, and is now codified as MISS. CODE ANN. § 97-19-67 (Supp. 1975).

[57] Of course, such legislative concerns as how much society is benefited by having a $101-shoplifter spend a year behind prison bars, are recognized as worthy considerations.

[58] J.C. Penney Co. v. Cox, 246 Miss. 1, 14, 148 So. 2d 679, 685 (1963).

[59] Southwest Drug Stores, Inc. v. Garner, 195 So. 2d 837, 842 (Miss. 1967).

the decision of the court is somewhat unclear as to the actual causes of action, but false imprisonment and slander seem to be the two grounds of complaint. Unlawful detention and slander were the grounds denominated in *Southwest Drug Stores*. Juries have returned and judges have affirmed higher verdicts in other jurisdictions. According to one source,[60] the United States Court of Appeals for the Fifth Circuit has upheld the highest verdict for compensatory damages—$25,000.[61] The damages were awarded for slander, $15,000, and for malicious prosecution, $10,000.[62] Even higher verdicts have been returned where punitive damages have been allowed; an occurrence not unpredictable where intentional torts are involved. In a Maryland case, where the total award was $40,000, $30,000 of this total was granted as punitive damages.[63] The Fifth Circuit and Maryland cases are, of course, extraordinary but reference to them well serves a point. Potential liability is substantial and the retailer should detain and question the suspected shoplifter with extreme care.

Representing pro-merchant decisions, *Scott-Burr Stores Corp. v. Edgar*,[64] discussed earlier, could be a valuable authority for the attorney defending a slander suit. Finding that a qualified privilege did exist between the employee and the plaintiff, since both had a mutual interest in the investigation,[65] the court in *Scott-Burr* found that the employee acted in good faith, that the slanderous words heard by plaintiff's fellow shopper came within the privilege, and that words heard by another employee did not exceed the limits of the privilege. Thus the court concluded:

> The occasion complained of being one of the qualified privilege, which repels the legal inference of malice otherwise existing from the use of words slanderous per se, it was necessary for [the shopper] to show actual or express malice . . . .[66]

Finding no malice, it found no slander, and the case was remanded for trial only upon the assault and battery charge.

The attorney for the retailer should always argue that the legislature in passing section 97-23-51, rendering the merchant, his employee, or a police officer not civilly liable for "slander, false arrest, false impris-

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[60] Donnell & Peacock, *supra* note 7, at 153.

[61] Reichenader v. Skaggs Drug Center, 421 F.2d 307 (5th Cir. 1970).

[62] *Id.* at 309.

[63] Great Atl. & Pac. Tea Co. v. Paul, 256 Md. 643, 261 A.2d 731 (1970) (where plaintiff's heart condition was aggravated as a result of the confrontation). For a capsule examination of punitive damages in Mississippi, see Comment, *Punitive Damages in Mississippi—A Brief Survey*, 37 Miss. L.J. 131 (1965).

[64] 181 Miss. 486, 177 So. 766 (1938).

[65] *Id.* at 502, 177 So. at 769.

[66] *Id.* at 503, 177 So. at 770.

onment, malicious prosecution, unlawful detention or otherwise,"[67] intended to provide qualified protection to the merchant from *any* type of action arising out of the merchant-shoplifter confrontation. For example, assault and battery and invasion of privacy should be included within the term "otherwise" in this writer's opinion. The enactment of the statute itself should signal the law-making branch's clear intention to protect the merchant effectively.[68] When so applied, section 97-23-51 offers total immunity to the merchant who comes within its friendly albeit nebulous confines.

II. Tangential Questions and Answers: A Dialogue

Q. May the fact that a merchant recognizes a shopper as a previous shoplifter be helpful in establishing probable cause to detain?

A. Though it is assuredly a valid reason to keep a close watch on the shopper, it would not seem to be an acceptable building block in constructing probable cause in Mississippi. Section 97-23-51 gives immunity to the merchant if he reasonably believes that "the person questioned is committing or attempting to commit the crime of shoplifting."[69] Trying to use the excuse that the shopper might be in possession of items previously suspected of being stolen would be unacceptable. The verbs are present tense, not past. Remember too the words of *J.C. Penney*: "The investigation should be based on more than mere conjecture or suspicion."[70]

Q. But surely this element, if present, is worth mentioning. It just makes common sense to count it.

A. Well, maybe the Mississippi court would take note of this decision: A Texas district court has held that where employees had missed merchandise when a shopper had shopped at their store before, they acted reasonably in supposing that the shopper was possessing stolen merchandise upon leaving the store the instant time.[71] Although Mississippi has not gone this far, the case is certainly good ammunition for the retailer's attorney.

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[67] Miss. Code Ann. § 97-23-51 (1972).

[68] *See generally* Donnell & Peacock, *supra* note 7; Note, *supra* note 3; Comment, *Shoplifting: Protection for Merchants In Wisconsin*, 57 Marq. L. Rev. 141 (1973); 50 N.C.L. Rev. 188 (1972) (discussing North Carolina's equivalent to section 97-23-51).

[69] Miss. Code Ann. § 97-23-51 (1972).

[70] J.C. Penney Co. v. Cox, 246 Miss. 1, 11, 148 So. 2d 679, 684 (1963).

[71] Burnaman v. J.C. Penney Co., 181 F. Supp. 633 (S.D. Tex. 1960); *accord*, Doyle v. Douglas, 390 P.2d 871 (Okla. 1964) (where evidence of alleged activities of a shopper 3 weeks prior to date of the instant incident was held properly admitted). *But see* Aley v. Great Atl. & Pac. Tea Co., 211 F. Supp. 500 (W.D. Mo. 1962) (criticizing *Burnaman*).

Q. Besides keeping both eyes open, is there any preventive legal action available to a store regarding a past shoplifter?

A. Interestingly, one avenue has been successfully traveled. In Washington, D.C., a customer's permanent exclusion from a retail store due to prior shoplifting arrests was held enforceable under a criminal trespass statute.[72] The court apparently weighed the store's power to discriminate regarding use of its private property by "undesirables" against whatever rights the shopper asserted and found the balance in favor of the store.[73] While the verdict should please stores, this area still seems too uncertain to counsel commitment to such a plan. And while retailers could obviously prevent suits for false arrest by not admitting certain prospective customers, the scene of such doorway confrontations is probably unacceptable to all but the most sterile, security-engrossed operations. Most retailers would probably frown on the public relations aspect of even a subtle check-in procedure.

Q. Back to establishing probable cause, what about the efficacy of tips or warnings from police, or other merchants in the shopping area or center? Would these help?

A. One Florida court thought so. In *Meadows v. F.W. Woolworth Co.*,[74] the evidence revealed only that three teenage girls had been in the store by the hairpiece counter and two hairpieces were later discovered missing. Having been warned several days earlier by the police to be on the lookout for teenage girls suspected of engaging in organized shoplifting activities, and determining that these girls met the general descriptions, the store manager went to the front entrance and called to the girls who had just stepped outside. The court found the applicable Florida statute,[75] which is similar to Mississippi's section 97-23-51, sufficient to exonerate the store manager from civil liability.

Q. Are the *Miranda*[76] warnings required before a merchant can question a suspected shoplifter?

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[72] United States v. Bean, Criminal No. 50426-70 (D.C. Super. Ct., May 12, 1971), *cited in* 1971 DUKE L.J. 995.

[73] *Id.*

[74] 254 F. Supp. 907 (N.D. Fla. 1966).

[75] FLA. STAT. ANN. § 901.34 (Supp. 1974).

[76] Miranda v. Arizona, 384 U.S. 436 (1966). As Justice Harlan plainly states in his dissent, the *Miranda* case requires that

> a fourfold warning be given to a person in custody before he is questioned, namely, that he has a right to remain silent, that anything he says may be used against him, that he has a right to have present an attorney during the questioning, and that if indigent he has a right to a lawyer without charge.

Id. at 504.

A. Apparently not.[77] While the area of citizen arrests and their accompanying problems are too mammoth to be treated thoroughly in this dialogue (and remember also that the admission or inadmission of incriminating statements will be irrelevant if no criminal charges are filed), these observations, though terse, may help answer this question. The merchant who detains a suspected shoplifter is acting out of self-interest, not broad public interest. Thus the detention, immersed in private rather than public waters, does not fall within the constitutional safeguards of the fourth amendment, which protects citizens from unlawful searches and seizures by the government.[78] The landmark case considering and rejecting the notion that store employees were required to give the *Miranda* warnings to detained suspects is *People v. Frank*.[79] There department store security guards, privately employed by the store, detained an employee suspected of theft. The employee, never warned of any constitutional rights, made several incriminating statements. She later claimed that these were inadmissible under *Miranda*. The court held that security guards of a department store were not required to inform a detained employee of her constitutional rights, since *Miranda* applied only to public police officers.[80] Six months later the rationale of *People v. Frank* was applied when a suspected shoplifter made similar contentions.[81] The *Frank* case soon gained cross-jurisdictional support when cited in the subsequent landmark case, *Schaumberg v. State*.[82] *Schaumberg* was cited as direct authority for the Mississippi Supreme Court's own statement on the matter of questioning by non-police personnel. In *McElroy v. State*[83] a prisoner confessed to his employer and his confession, used against him at trial, was held to be properly admitted, even though no warnings were given.[84]

Q. If the detention is considered private, not public, then how do you explain that recent Fifth Circuit case, *Smith v. Brookshire Brothers, Inc.*,[85] which held the store owner liable for damages under the Civil Rights Act when he detained two shoppers and the police arrested them?

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[77] *See* Comment, *supra* note 68. *But see* Comment, *supra* note 12.

[78] Burdeau v. McDowell, 256 U.S. 465, 475 (1921).

[79] 275 N.Y.S.2d 570 (1966).

[80] *Id.* at 572.

[81] People v. Williams, 281 N.Y.S.2d 251 (Syracuse City Ct. 1967).

[82] 432 P.2d 500 (Nev. 1967)(where supervisors questioned employees without *Miranda* warnings).

[83] 204 So. 2d 463 (Miss. 1967).

[84] *Id.* at 465. For a discussion of the above cases and the applicability-inapplicability of *Miranda* warnings by non-police interrogators, see Note, *Criminal Law-Admissibility of Confessions or Admissions of Accused Obtained During Custodial Interrogation by Non-Police Personnel: Are the Miranda Warnings Required?*, 40 MISS. L.J. 139 (1968).

[85] 519 F.2d 93 (5th Cir. 1975).

A. The attorney for the retail merchant can only hope that this case will be reversed, and until it is, distinguish it on its facts. In *Brookshire Brothers* the plaintiffs brought an action for damages alleging false imprisonment, malicious prosecution, and violation of civil rights protected under section 1983.[86] The two shoppers, Virdie Smith and Donnie McClure, entered the store to buy groceries. McClure found a jar of cold cream and put it in the outside pocket of her purse.[87] While she was in the vicinity of the checkout counter, not yet having passed through the checkout counter, she and Smith were detained by two store employees and taken to the rear of the store. The employees called the police and an officer arrived on the scene. Told they had taken a jar of cold cream, he took them down to the police station and fingerprinted and booked them. While no written complaint was made out at the time, the police took the women into custody. A store officer arrived at the station some minutes later and signed the form presented by a police officer.[88] Explaining how section 1983 applied, the court stated:

> [I]n order for the defendant-appellant Brookshire to be liable under § 1983 for fostering a detention without probable cause, the plaintiffs must show that Brookshire was acting under color of law. The police may have made a mistake but they are not defendants here. The store managers may have made a mistake in detaining appellees but that alone would not make them liable under § 1983; it would only create a state tort action, depending on the state's false imprisonment standard. The plaintiffs had to show that the police and the store managers were acting in concert; that Brookshire and the police had a customary plan whose result was the detention in the present case.[89]

The district court found such a preconceived plan, and the Fifth Circuit did not believe this finding "clearly erroneous."[90] The fallacy in the court's reasoning lies in its notion that the store was a legally potent partner with the police in devising and executing the so-called "preconceived plan."[91] In fact, as the dissent persuasively argues, this "plan" involved no more than the police agreeing to respond to calls.[92] Brook-

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[86] 42 U.S.C. § 1983 (1970) provides:

> Every person who, *under color of any statute* . . . of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress [emphasis added].

[87] 519 F.2d at 93-94.

[88] *Id.* at 94.

[89] *Id.*

[90] *Id.*

[91] *Id.* at 95.

[92] *Id.* (Gee, J., dissenting).

shire Brothers had no control over how the police handled their job once they arrived and therefore should not have been found liable under section 1983. As Judge Gee wrote in dissent:

> The vision of a citizen's hesitating to call for police assistance in fear they may, when they arrive, employ some unconstitutional procedure over which he has no control and thus render him liable in a § 1983 action is not an attractive one.[93]

An alternative method of finding the requisite state action has been argued: that the statute permitting merchant questioning vests the shopkeeper with sufficient authority to come within "color of state law." Fortunately the courts have found this theory to be without merit. As one court has phrased it: "The fallacy of plaintiff's argument appears to be in equating acting under *license of state law* with acting under *authority of state law.*"[94] Similarly, a federal district court in treating Colorado's merchant detention statute,[95] which is comparable to Mississippi's section 97-23-51, concluded that it was "intended merely to license a shopkeeper to undertake self-help to protect his property—it does not vest him with the authority of the state."[96] Surely this interpretation is the correct one, and it should indicate that shopkeepers who question and detain—labeled by some as "the merchant police"[97]—are viewed by the courts primarily as merchants.

Q. To summarize then, at this time there is no need to give any warnings before questioning a shopper, if the merchant meets the requirements of probable cause and reasonableness?

A. That is correct.

Q. How does a store avoid liability under the federal statute section 1983?

A. By avoiding the creation or maintenance of an actual plan of detention which could be construed as action in concert with the police. Keep the detention by the store and the subsequent arrest by the police a distinct, two-step process. If the roles of each remain separate, hopefully a result similar to *Smith v. Brookshire Brothers, Inc.*[98] can be avoided.

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[93] *Id.* at 97.

[94] Weyandt v. Mason's Stores, Inc., 279 F. Supp. 283, 287 (W.D. Pa. 1968) (emphasis added).

[95] COLO. REV. STAT. § 40-5-31 (1963).

[96] Warren v. Cummings, 303 F. Supp. 803, 805 (D. Colo. 1969); *accord*, Weyandt v. Mason's Stores, Inc., 279 F. Supp. 283, 287 (W.D. Pa. 1968).

[97] See Comment, *supra* note 12, at 311.

[98] 519 F.2d 93 (5th Cir. 1975).

Conclusion

Shoplifters continue to steal billions of dollars worth of merchandise each year. The losses may be absorbed by the merchant and passed on to the consumers who pay indirectly for the stolen goods, or the losses may be responsible for the collapse of a business engaged in the highly competitive retail trade.[99] To prevent immediate loss and to protect his goods the merchant wants to detain and question those he believes are stealing from him. The Mississippi Legislature has provided that if this belief is in good faith based upon probable cause and reasonable grounds, and if the investigation is handled in a reasonable manner, the merchant, his employees, or the police summoned will not be held civilly liable if the suspect is innocent.[100] The courts have determined, on a case-by-case analysis, what, in each particular circumstance, was probable cause, what were reasonable grounds, and what were reasonable methods. The attorney's responsibility is to explain to his client what it takes to detain and how the detention and investigation should be conducted *before* he receives the notice of a suit for false imprisonment and slander. It is up to the juries, and finally the courts, however, to award reasonable damages if any are due. The disparity between the value of the item thought stolen (perhaps 50 cents) and the potential civil damages awaiting the merchant who enters the twilight of probable cause (say $5000) may some day lead to no arrests, no profits, and no privately-owned retail stores.

Jack Raymond Reed, Jr.

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[99] See Note, *supra* note 3, at 826 n.10.

[100] Miss. Code Ann. § 97-23-51 (1972).

APPENDIX

A Suggested Checklist for the Attorney and the Merchant and His Employees: How to Detain and Question a Suspected Shoplifter and Still Avoid Civil Liability

1. Only those employees with an understanding of the proprieties and improprieties involved in both areas of the detention (that is, (1) what knowledge is sufficient to constitute probable cause and (2) what constitutes reasonable investigative procedure) should be allowed to detain a suspected shoplifter.

2. The merchant or employee effecting detention should have probable cause to detain. In Mississippi, an employee's mere suspicion is not enough. The fact that a patron looks suspicious is not enough. A tip by another customer who merely believes that a theft has occurred is not enough.

If the customer has just left the store, a check with the cashier, if the suspect exited past the cashier, should be accomplished. Any other reasonable acts of investigation (for example, a quick look in the dressing room, if relevant) should also be carried out. Ideally, probable cause would be established where the employee saw, firsthand, the shopper take the item, conceal it (or not) and walk past the cashier. But this degree of certainty has not been required in order to avoid civil liability. The standard the Mississippi Supreme Court has given is that probable cause to investigate "must be grounded on some definite information from some person that saw enough to justify the belief that a theft had been made."

3. The method used in stopping and questioning the suspected shoplifter must be reasonable. The first statement should not be: "You stole that item!" A request to return to a less public area of the store should be made before anything else is said or done. Then a request to see the sales slip should be made. If at all possible, avoid "making a scene." Vocal confrontations which humiliate and embarrass the suspect in front of other shoppers are fertile grounds for a subsequent suit.

If the person refuses to return or begins to leave, reasonable force may be used to the extent that it is necessary to detain him. Be careful, however, it may be wiser to note the shopper's description and call the police.

4. If the merchant's suspicions are correct and the suspect cannot clear himself, the police should be called immediately.

5. Remember, the cost of the item is usually too small and the potential civil liability too great for the merchant to wage an unbridled attack on a suspected shoplifter.

AN ANALYSIS OF MISSISSIPPI'S CRIMINAL LAW UNDER THE EQUAL RIGHTS AMENDMENT

> [T]he principle which regulates the existing social relations between the two sexes—the legal subordination of one sex to the other—is wrong in itself, and now one of the chief hindrances to human improvement; and . . . ought to be replaced by a principle of perfect equality, admitting no power or privilege on the one side, nor disability on the other.[1]

Since Congress submitted the Equal Rights Amendment[2] [hereinafter ERA] to the states for ratification a blistering controversy has emerged, slowing what once appeared to be a swift ratification of the proposed twenty-seventh amendment to the United States Constitution.[3] The proposed amendment provides:

> Section 1. Equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex.
> Section 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.
> Section 3. This amendment shall take effect two years after the date of ratification.

The purpose of this comment is to analyze the scope of the ERA and the statutory reform it mandates. Part I defines the ERA's basic principle, its scope, and how it will function within the constitutional framework. Part II examines the effect that ratification would have on the various areas of Mississippi's criminal law.

This commentary is not intended to be exhaustive but merely illustrative. Its bifurcated intent is to present a rational overview of a topic of great import and to scrutinize existing Mississippi criminal law and amendments to it which would be necessary after passage of the ERA. This latter purpose will be achieved with the intent to preserve existing criminal proscriptions as much as possible.

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[1] J. MILL, THE SUBJECTION OF WOMEN 5 (1869).

[2] H.R.J. Res. 208, 92d Cong., 1st Sess. (1971) passed the house in original form by a vote of 354 to 24 with Mississippi Congressmen G.V. Montgomery and Charles Griffin voting in the affirmative. 117 CONG. REC. 35815 (1971). The Senate approved the joint resolution without amendment by a vote of 84 to 8 with Senator James Eastland pairing against it and Senator John Stennis voting against it. 118 CONG. REC. 9598 (1972).

To date 35 or 33 states have ratified the ERA depending upon whether a state has the power to rescind after ratification. On this issue see Martin, *State Legislative Ratification of Federal Constitutional Amendments: An Overview*, 9 U. RICHMOND L. REV. 271, 293-98 (1975).

[3] *See* TIME, Nov. 17, 1975, at 65.

I. The ERA—Basic Principle and Scope

The purpose of the ERA is clear and unambiguous—to end the use of sex classifications in determining legal rights.[4] Traditionally, lawmakers have employed sex as a shorthand method for divining functional character traits.[5] This process results in blanket classifications of persons by recognizing the presence (or absence) of functional traits solely on the basis of sex.[6] Under the ERA, the fact that most members of one sex and few members of the opposite sex possess the functional trait cannot justify an irrebuttable presumption of competency or incompetency based only upon the sex of the person classified.[7] The ERA requires the law to deal with a person according to the characteristics of that individual, rather than to rely on stereotypes based upon sex.[8] Although the amendment does not question society's inherent right to command its members to share different rights and duties,[9] it does decree that differentiation be founded upon functional criteria, such as

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[4] Brown, Emerson, Falk & Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871, 889 (1971) [hereinafter cited as Emerson]; Ferrell, *The Equal Rights Amendment to the United States Constitution—Areas of Controversy*, 6 URBAN LAW. 853, 863 (1974). Senator Ervin says the Emerson article will constitute "primary legislative history" and is "one of the best guides to general interpretation." 118 CONG. REC. 9096 (1972). The legislative history speaks to an "exception" which would allow the states to regulate sexual relations as an exercise of their traditional police powers. SENATE COMM. ON THE JUDICIARY, EQUAL RIGHTS FOR MEN AND WOMEN, S. REP. NO. 689, 92d Cong., 2d Sess. 12 (1972). In reality, however, this is not an exception. For ERA purposes, a sex-based classification is one that categorizes rights and duties in terms of gender. To proscribe certain acts because of their sexual nature is not a sex-based classification. *See* 118 CONG. REC. 9331 (1972) (remarks of Senator Bayh); Ginsburg, *Gender and The Constitution*, 44 U. CIN. L. REV. 3, 4 (1975); *cf.* Gay Students Org. v. Bonner, 509 F.2d 652, 663 (1st Cir. 1974). *But see* Acanfora v. Board of Educ., 359 F. Supp. 843, 852-53, *aff'd*, 491 F.2d 498 (4th Cir.), *cert. denied*, 419 U.S. 836 (1974). *See generally* G. COOPER, H. RABB & H. RUBIN, FAIR EMPLOYMENT LITIGATION 277-78, 296-98 (1975). The ERA does require, however, that both sexes be equally accountable and equally punished for any sexual activity the legislature forbids.

The amendment does not challenge the validity of laws treating animals differently on the basis of sex classifications. *See* 117 CONG. REC. 35782-83 (1971). For an example of such a law, see MISS. CODE ANN. § 97-29-57 (1972) (stallion or jack can not be kept in public view).

[5] This analysis need not be limited to literal "functions." It also applies to classifications based on prior education and training, experience, skills, or other measurable traits and abilities. The term "functional classification" can thus be used to refer to all non-sex-based classifications.

Emerson, *supra* note 4, at 897.

[6] Comment, *An Overview of the Equal Rights Amendment in Texas*, 11 HOUSTON L. REV. 136, 140 (1973).

[7] Emerson, *supra* note 4, at 889.

[8] Ferrell, *supra* note 4, at 863.

[9] Emerson, *supra* note 4, at 889.

physical ability, intelligence, or character.[10] Thus, under the proposed amendment sex becomes an unacceptable standard by which to judge the right to alimony and child support,[11] the right to be the state librarian,[12] or the duty to refrain from sexually assaulting another,[13] since sex would be irrelevant to any permissible legislative purpose. The law instead, must concern itself with the relevant *functional* criteria: the need for support; the character and training of the potential librarian; society's interest in protecting all citizens from sexual assault.[14]

Under the ERA, a constitutional infirmity arises not because the legislature attempts to deal with a matter through classification, but because by choosing sex as the determinative factor in such a classification, the lawmakers pursue a per se irrational and discriminatory course. Thus, as the analogous Civil War Amendments prohibit racial discrimination, the ERA would constitutionally prohibit laws and official practices[15] that differentiate on the basis of an immutable characteristic.[16] In this respect, some commentators argue that the ERA makes sex, like race, a "suspect classification."[17] The ERA, however, does not make sex classifications suspect—it prohibits them.[18] As applied to the ERA, other catch phrases, such as "compelling governmental interest"[19] and "rational relation to a legitimate government interest,"[20] provide a familiar, but incomplete, framework for analysis;[21] most cases employing that phraseology arise in a different context, analogous to, but not

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[10] *Id.*; Comment, *The Equal Rights Amendment: Its Meaning and Its Impact on Missouri Law*, 39 Mo. L. Rev. 553 (1974).

[11] In Mississippi, only the wife may receive alimony. Miss. Code Ann. § 93-5-23 (1972); *see* Felder v. Felder, 195 Miss. 326, 13 So. 2d 823 (1943); Robinson v. Robinson, 112 Miss. 224, 72 So. 923 (1916).

[12] Miss. Const. art. IV, § 106 provides that only women are eligible for the position of state librarian.

[13] See text accompanying notes 104 through 118 *infra*.

[14] Emerson, *supra* note 4, at 889-90.

[15] The ERA applies only to state action. See text accompanying notes 44 through 51 *infra*.

[16] In this respect the amendment is in line with judicial decisions banning classification based upon other accidents of birth. *See, e.g.*, Graham v. Richardson, 403 U.S. 365, 371-72 (1971)(classifications based on alienage are inherently suspect); McLaughlin v. Florida, 379 U.S. 184, 191-92 (1964) (race classifications are suspect).

[17] *See, e.g.*, Comment, *supra* note 10, at 553, 554 (1974). Suspect classifications are discussed in Sugarman v. Dougall, 413 U.S. 634, 642 (1973) (alienage is a suspect classification).

[18] Emerson, *supra* note 4, at 889.

[19] Shapiro v. Thompson, 394 U.S. 618, 627 (1969).

[20] Williamson v. Lee Optical Co., 348 U.S. 483, 488 (1955); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78-79 (1911).

[21] Ferrell, *supra* note 4, at 866. For a discussion of these concepts in the context of unequal school funding, see Rodriguez v. San Antonio Ind. School Dist., 411 U.S. 1 (1973).

dealing directly with, invidious sex discrimination. Since these cases employ factors in their balancing approach which are irrelevant in a sex discrimination context, they are not indicative of proper sex discrimination analysis.[22]

Congressional proponents of the amendment, agreeing that "equality can only be soiled by qualification,"[23] rejected a spate of amendments attempting to weaken the original wording of the ERA.[24] Commentary bears out this absolute interpretation which treats sex as something more than a suspect classification.[25]

Dual value judgments underpin the decision to eliminate sex-based discrimination. First, the amendment seeks to implement by constitutional mandate emerging social values which reject all class-wide subordination of women by government, both federal and state. Proponents adhere to the principle that women are "entitled to an equal status with men."[26] Recalling the ease with which racial discrimination was perpetuated under the "separate but equal" phase of the civil rights struggle,[27] proponents reject anything less than a "single system of equality,"[28] contending that alternative concepts of equality, embracing a dual system of rights and responsibilities, can yield only a separate and inherently unequal sex-based legal system.[29] Furthermore, proponents reject

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[22] Emerson, *supra* note 4, at 880-81, 892-93.

[23] HOUSE COMM. ON THE JUDICIARY, EQUAL RIGHTS FOR MEN AND WOMEN, H. REP. NO. 359, 92d Cong., 1st Sess. 8 (1971). The "separate views" of the dissenting members of the House Committee are germane since the full House rejected the report of the House Judiciary Committee and passed the unamended version of the ERA. The "separate views" were also adopted by the Senate Judiciary Committee in its report on the amendment. S. REP. No. 689, *supra* note 4, at 11-13 (1972).

[24] Three amendments were overwhelmingly defeated by the House. 117 CONG. REC. 35, 782-815 (1971). Senator Ervin proposed six amendments; one was withdrawn, and the other five overwhelmingly rejected by the Senate. 118 CONG. REC. 9314-72 (1972). The amendments ranged from attempts to preserve anti-homosexual laws of the various states to exempting women from the draft.

[25] Emerson, *supra* note 4, at 880-81, 891-93.

[26] *Id.* at 890.

[27] The "separate but equal" doctrine first set out in Plessy v. Fergerson, 163 U.S. 537 (1896), was rejected by a unanimous Court in Brown v. Board of Educ., 347 U.S. 483 (1954). In *Brown* the Court, per Mr. Chief Justice Warren, held: "We conclude that *in the field of public education* the doctrine of 'separate but equal' has no place. Separate *educational* facilities are inherently unequal." *Id.* at 495 (emphasis added). This langauge leaves open the question whether in an ERA context this doctrine may be revived to permit restrooms to be segregated by sex. See text accompanying notes 67 through 87 *infra*.

[28] Emerson, *supra* note 4, at 890; Ferrell, *supra* note 4, at 865; Comment, *supra* note 10, at 554.

[29] Emerson, *supra* note 4, at 890; *see* Brown v. Board of Educ., 347 U.S. 483, 495 (1954). *But see* Vorchheimer v. School Dist., 400 F. Supp. 326, 334 n.1 (E.D. Pa. 1975); Williams v. McNair, 316 F. Supp. 134 (D.S.C. 1970), *aff'd*, 401 U.S. 951 (1971).

a second alternative to absolute equality: one conferring special benefits upon women while relieving them of the more onerous duties of citizenship.[30] Classification of this sort usually is justified by some notion of "romantic paternalism" which has, in the words of the United States Supreme Court, "put women not on a pedestal, but in a cage."[31]

Maximum hours laws exemplify the discriminatory effect of purported special benefits.[32] Spawned by a legislative desire to protect the "weaker sex" from unscrupulous sweatshop operators,[33] these laws prohibit women from working longer than the prescribed statutory work week. The ERA does not per se forbid maximum hours laws; nor does it require that such laws treat men and women equally by lumping them into some amorphous labor pool subject to groupwide regulation without consideration of individual ability.[34] What is required is that sex not be the basis for determining the presence or absence of relevant functional criteria—physical strength and stamina.[35] Since the functional criteria must vary from person to person, sex-based classifications serve to prevent willing, capable women from taking advantage of lucrative overtime pay while allowing physically incapable men to continue working.[36] This result serves to discriminate invidiously and irrationally against that capable class of women solely because of their sex. Unless these laws are redrawn in a manner equally applicable to men or drawn in sex-neutral terms basing their proscription upon functional qualities ascertained on an individual basis, they will fall under the ERA.

Critics of the ERA cite recent federal legislation[37] as mooting the

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[30] Emerson, *supra* note 4, at 890. In 1950 Senator Hayden proposed that equality for women required that women be granted the "benefits and privileges of citizenship" but not be required to perform the more onerous duties of citizenship. 96 CONG. REC. 738 (1950). A Hayden version of the ERA passed the Senate in 1950 and in 1953; on both occasions the House failed to pass the bill.

[31] Frontiero v. Richardson, 411 U.S. 667, 684 (1973).

[32] *See, e.g.*, MISS. CODE ANN. § 71-1-33 (1972) (women are limited to working 10 hour days and 60 hour weeks). *See generally Hearings on Section 805 of H.R. 16098 Before the Special Subcomm. on Education of the House Comm. on Education and Labor*, 91st Cong., 2d Sess., pt. 1, at 592, 595-96 (1970).

[33] *See* Muller v. Oregon, 208 U.S. 412 (1908).

[34] This result may be necessary, though, since attempts at individual classification based upon functional criteria are administratively unfeasible. *But see* Bowe v. Colgate-Palmolive Co., 416 F.2d 711, 718 (7th Cir. 1969).

[35] The United States Court of Appeals for the Ninth Circuit held "protective" labor legislation resulting in a discriminatory effect upon a protected class a violation of Title VII of the Civil Rights Act of 1964. 42 U.S.C. §§ 2000e *et seq.* (1964). Rosenfield v. Southern Pac. Co., 444 F.2d 1219, 1225-26 (9th Cir. 1971). *See generally Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1166-95 (1971).

[36] *See* Mengelkoch v. Industrial Welfare Comm'n, 442 F.2d 1119, 1122-23 (9th Cir. 1971).

[37] *E.g.*, Civil Rights Act of 1964, Title VII, 42 U.S.C. §§ 2000e-2000e-15 (1964).

significance of the ERA as a bar to sex discrimination in employment.[38] Proponents argue that even after these laudable congressional enactments, two significant reasons for ERA adoption remain. First, equality would be better effectuated and preserved by a constitutional mandate since federal statutory protection could be repealed or diluted by amendment. Second, the United States Supreme Court and the United States Court of Appeals for the Fifth Circuit have not extended Title VII's anti-sex discrimination provisions as far as would the ERA.[39]

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[38] Freund, *The Equal Rights Amendment Is Not the Way*, 6 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 234, 235 (1971).

[39] Title VII is Congress' bold attempt to abolish discrimination in employment. However, the judicial view of Title VII's proscription against sex-based discrimination is more lenient than the ERA would allow. For example, the Supreme Court in Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971), indicated that an employer could establish a class-wide, bona fide occupational qualification [BFOQ] through an evidentiary showing that the existence of traditional female family obligations (caring for pre-school age children), "if demonstrably more relevant to job performance for a woman than for a man, could arguably be a basis for distinction under § 703(e) [of Title VII]." *Id.* at 544. Concurring in the result, Mr. Justice Marshall noted that the majority opinion seems to allow the BFOQ exception to "swallow the rule." *Id.* at 545. Marshall asserts that the Court's indication that a class-wide BFOQ might be established by a showing that some women, or even the vast majority of women, could not perform up to the employer's minimum standards would justify discrimination solely by sex. Continuing, he suggests that this standard results in impermissible sex discrimination against individual women who can adequately perform these jobs. Since the employment criteria utilized is not a "specific physical characteristic necessarily possessed by only one sex," to allow such criteria to become a BFOQ is to broaden the exception past the narrow confines Congress intended. *Id.* at 545-47.

The United States Court of Appeals for the Fifth Circuit's approach emerges as a classification of the majority opinion in *Phillips*. In Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228 (5th Cir. 1969), the court, per Judge Johnson, held that

> in order to rely on the [BFOQ] exception an employer has the burden of proving that he had reasonable cause to believe, that is, a factual basis for believing, that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved.

Id. at 235; *see* Long v. Sapp, 502 F.2d 34, 39-40 (5th Cir. 1974). The Supreme Court and the Fifth Circuit approach to the BFOQ exception to Title VII therefore appears less demanding than the ERA's unique physical characteristic exception.

Thus, it seems that the BFOQ exception to Title VII, as construed by the Supreme Court and the Fifth Circuit, would permit some forms of class-wide stereotypes to exist as the basis for discrimination against otherwise qualified females. The Fifth Circuit, noting the lack of debate on the sex discrimination proscriptions of Title VII, concludes by negative inference that "Congress in all probability did not intend for its proscription of sexual discrimination to have significant and sweeping implications." Willingham v. Macon Tel. Publishing Co., 507 F.2d 1084, 1090 (5th Cir. 1975) (en banc), *rev'g* 482 F.2d 535 (5th Cir. 1973). This test is less demanding than the scrutiny applied to the conduct of an employer who seeks to fit his selection criteria within the unique physical characteristic exception to the ERA. Other courts, most notably the United States Court of Appeals for the Third Circuit, have defined a BFOQ for purposes of Title VII just as advocates of

The second value judgment underpinning the ERA emanates from fundamental concepts of individual liberty which allow each person to "pursue the fulfillment of [one's] individual potential, free from arbitrary interference by government."[40] When classification by sex is used as a basis for disparate treatment (except where the classification is based upon a physical characteristic unique to one sex),[41] the classification is a per se overclassification; both sexes are included or excluded without regard to functional traits which are the permissible subjects of legislative concern.[42] State regulation of this sort creates an irrebuttable presumption of capacity or incapacity based solely upon prevailing sexual stereotypes.[43]

By its express provisions section 1 of the ERA[44] prohibits inequality stemming only from "state action."[45] Although state action is an amorphous concept, it consists of two reasonably discernible components: "state involvement"[46] and "public function."[47] This concept presents a

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the ERA define a unique physical characteristic. In Wetzel v. Liberty Mut. Ins. Co., 511 F.2d 199 (3rd Cir. 1975), the court required that

> women be considered on an individual basis on their own particular capabilities and not on characteristics generally attributed to the group. A policy, therefore, found on generalization . . . is discriminatory because it makes no provision for considering individual capabilities.

Id. at 207-08 (citation omitted); *accord*, Sprogis v. United Air Lines, Inc., 444 F.2d 1194, 1198-99 (7th Cir. 1971); Rosenfield v. Southern Pac. Co., 444 F.2d 1219, 1224-25 (9th Cir. 1971); Bowe v. Colgate-Palmolive Co., 416 F.2d 711, 718 (7th Cir. 1969); 29 C.F.R. § 1604.2(a)(1)(ii) (1975). *See generally Developments in the Law*, *supra* note 35, at 1176-86; Annot., 12 A.L.R. Fed. 15, 104-31 (1972).

[40] Krauskopf, *The Equal Rights Amendment: Its Political and Practical Context*, 50 Calif. St. B.J. 79 (1975).

[41] See text accompanying notes 52 through 62 *infra*.

[42] Emerson, *supra* note 4, at 890.

[43] The Seventh Circuit in Bowe v. Colgate-Palmolive Co., 416 F.2d 711 (7th Cir. 1969), rejected as a bona fide occupational qualification an employer's conclusive presumption that women were unable to lift more than 35 pounds. The Court reasoned that "it is best to consider individual qualifications and conditions, such as the physical capability and physiological makeup of an individual, climatic conditions, and the manner in which the weight is to be lifted." *Id.* at 718.

[44] H.R.J. Res. 208, S.J. Res. 8, 92d Cong., 1st Sess. (1971).

[45] Detailed analysis of this limitation is beyond the scope of this commentary. For a broader analysis of the state action problem, see Black, *The Supreme Court 1966 Term: State Action, Equal Protection, and California's Proposition 14*, 81 Harv. L. Rev. 69 (1967); Burke & Reber, *State Action, Congressional Power and Creditor's Rights: An Essay on the 14th Amendment*, 46 S. Cal. L. Rev. 1003 (1973); Note, *State Action and the Burger Court*, 60 Va. L. Rev. 840 (1974).

[46] State involvement may vary in degree and in form. Several types of activity and nonactivity have been found to constitute state involvement. The classic example and the easiest to recognize is direct action by a state officer or agent. *E.g.*, Fuentes v. Shevin, 407 U.S. 67 (1972) (replevin by state officer); Monroe v. Pape, 365 U.S. 167 (1961) (policeman exceeding his authority to act). Private action joined with state activity also consti-

crucial limitation on the scope of the ERA: Purely private or individual action will not be restricted by the ERA.[48] Delineating the public sector wherein sex-based differentiation is to be forbidden and the private sector where such differentiation is to be permitted is a principal issue under the ERA.[49] Proper resolution of this issue consists in balancing the purpose of the amendment, the form and degree of state involvement, and the seriousness of the discriminatory effect against the unarticulated rights of association and privacy of those claiming to belong to the private sector.[50] A substantial body of case law and commentary (the product of fourteenth amendment analysis) exists to provide an analogous framework for understanding this problem in a sex discrimination context.[51]

Congressional intent[52] and physical reality[53] signal that even the most emancipated view of the ERA yields to two narrow but important exceptions: the unique physical characteristic exception and the privacy exception.

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tutes state involvement. *E.g.*, Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961) (coffee shop leased building and shared profits of operation with state); Golden v. Biscayne Bay Yacht Club, 521 F.2d 344 (5th Cir.), *rehearing en banc granted*, No. 74-1349 (Nov. 19, 1975) (city leased bed of bay for token fee to yacht club; conduct of city constitutes sufficient state action to bring club's discriminatory membership practices within proscription of fourteenth amendment); Smith v. Brookshire Bros., Inc., 519 F.2d 93 (5th Cir. 1975) (a finding that store manager acting in concert with police according to prearranged plan, pursuant to store's anti-shoplifting policy, was an actor under color of state law and thus liable for damages in section 1983 suit, not clearly erroneous). *But see* Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972) (private club on private land not acting in concert with state solely on basis of state liquor licensing). States also are forbidden to compel private action violative of individual rights. *See, e.g.*, Peterson v. Greenville, 373 U.S. 244 (1963) (ordinance requiring segregation in private restaurants). For an in-depth analysis of the limits of state action, see Burke & Reber, *supra* note 45, at 1042-109.

[47] The public function concept finds state action present when private parties perform what is essentially a public function. *See* Marsh v. Alabama, 326 U.S. 501 (1946) (company-owned town functional equivalent of municipality); Nixon v. Condon, 286 U.S. 73 (1932) (Democratic State Executive Committee, acting pursuant to state statute, refused vote to black).

[48] H.R. REP. No. 359, *supra* note 23, at 7; Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972); Shelley v. Kraemer, 344 U.S. 1 (1947); Civil Rights Cases, 109 U.S. 3 (1883).

[49] Emerson, *supra* note 4, at 906.

[50] The Supreme Court has never enunciated a specific test but rather prefers to utilize a case-by-case approach to determine the existence vel non of state action. Note, *supra* note 45, at 843. The factors cited in the text include major considerations but are not an exhaustive listing.

[51] S. REP. No. 689, *supra* note 4, at 6-11.

[52] *See Equal Rights 1970, Hearings on S.J. Res. 61 and S. J. Res. 231 Before Senate Comm. on the Judiciary*, 91 Cong., 2d Sess. (1970) [hereinafter cited as *Senate Hearings*]; *Equal Rights for Men and Women 1971, Hearings on S.J. Res. 35, 208 and Related Bills Before Subcomm. No. 4 of the House Comm. on the Judiciary*, 92d Cong., 1st Sess. (1971) [hereinafter cited as *House Hearings*]; Emerson, *supra* note 4, at 893.

[53] Comment, *supra* note 6, at 140-41.

A. *Physical Characteristics Unique to One Sex*

One countervailing principle allows differentiation based upon "a physical characteristic unique to one sex."[54] Legislation cannot be deemed to deny equal rights to one sex when members of that sex do not possess the functional trait which is the object of legislative purpose.[55] Therefore, laws regulating abortion,[56] applicable only to women, and laws prohibiting castration, protecting only men, would not violate the twenty-seventh amendment.[57] This principle, however, must be applied with prudence and foresight lest it allow creation of a dual system of rights, abrogating the full equality guaranteed by a unitary system of rights.[58]

The exception is limited to unique *physical*[59] attributes and does not contemplate traits predominant in one sex due to psychological composition, cultural training, or socialization.[60] Emerson and his associates justify this result by reasoning that only physical characteristics can, with assurance, be deemed immutably unique to one sex.[61] Since other traits—the products of socialization—are found in varying degrees in both sexes, further extention of this exception to include them would result in an impermissible overclassification.[62]

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[54] Emerson, *supra* note 4, at 893.

[55] So long as the law deals only with a characteristic found in all (or some) women but *no* men, or in all (or some) men but *no* women, it does not ignore individual characteristics found in both sexes in favor of an average based on one sex. Hence such legislation does not, without more, violate the basic principle of the Equal Rights Amendment.

Id.

Thus a law concerning a physical characteristic unique to one sex may employ sex classifications.

[56] *E.g.*, MISS. CODE ANN. § 97-3-3 (1972). Although this law might run afoul of the mandate of Roe v. Wade, 410 U.S. 113 (1973), it is not violative of the ERA. *Compare* Spears v. State, 278 So. 2d 443 (Miss. 1973), *with* Spears v. Ellis, 386 F. Supp. 653 (S.D. Miss. 1974), *and* Spears v. Circuit Court, 517 F.2d 360 (5th Cir. 1975).

[57] Emerson, *supra* note 4, at 893; Note, *Sex Discrimination in the Criminal Law: The Effect of the Equal Rights Amendment*, 11 AM. CRIM. L. REV. 469, 470-71 (1973). An example of a permissible statute under this doctrine is MISS. CODE ANN. § 99-19-57 (1972) (stay of execution of pregnant women until "no longer pregnant").

[58] Emerson, *supra* note 4, at 894; Note, *supra* note 57, at 471. The Senate rejected a proposed amendment to the ERA allowing distinctions based upon "physiological or functional differences." 118 CONG. REC. 9537-38 (1972).

[59] Physical attributes, almost without exception, will relate to a biological function unique to one sex. Comment, *supra* note 6, at 141.

[60] Emerson, *supra* note 4, at 893; Comment, *supra* note 6, at 140-41; *cf.* Phillips v. Martin Marietta Corp., 400 U.S. 542, 545-47 (1971) (Marshall, J., concurring).

[61] Emerson, *supra* note 4, at 893-94.

[62] *Id.*; *see* EEOC Case Nos. AU 68-10-209E, *et al.*, July 24, 1968, *reported in* Bowe v. Colgate-Palmolive Co., 416 F.2d 711 (7th Cir. 1969).

A corollary to this principle requires legislation to be "directly" and "narrowly" related to the unique physical characteristic.[63] Unless judicial scrutiny is keen and sympathetic, this exception could lead to abuses which would have a grave discriminatory effect.[64] In weighing these factors which help determine whether a sufficient nexus exists,[65] the court must apply strict scrutiny rather than mere mean scrutiny.[66]

B. The Privacy Qualification

> That the individual shall have full protection in person and in property is a principle as old as the common law; but it has been found necessary from time to time to define anew the exact nature and extent of such protection.[67]

Despite Congressional adoption of an "absolute" standard of equality, the legislative history indicates that the right of privacy should act as a second important limitation upon the scope of the ERA.[68] Harmo-

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[63] Ferrell, *supra* note 4, at 867.

[64] *Id.*

[65] Emerson suggests balancing the following factors to determine whether the necessary "close, direct, and narrow" nexus exists between the legislative classification and the unique physical characteristic: (a) the proportion of the sex who actually have the characteristic; (b) the relation between the characteristic and the problem; (c) the proportion of the problem attributable to the unique physical characteristic of that sex; (d) the proportion of the problem eliminated by the solution; (e) the availability of less onerous, narrower in scope, or sex-neutral alternatives; and (f) the importance of the problem ostensibly being solved, as compared with the costs of the least drastic solution. Emerson, *supra* note 4, at 894-96. A similar analysis is applicable to facially nondiscriminatory laws which place a heavier burden or benefit on one sex.

[66] *Id.* at 894; Ferrell, *supra* note 4, at 867-68. *But see* Comment, *supra* note 10, at 555.

[67] Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 191, 193 (1890). The Supreme Court of the United States discussed a constitutionally guaranteed right of privacy in Griswold v. Connecticut, 381 U.S. 479 (1965). Therein, the Court, per Mr. Justice Douglas, held that the right of privacy, existing in the "penumbras, formed by emanations" of the specific guarantees of the first, third, fourth, fifth, ninth, and fourteenth amendments, constitutionally protects the "sanctity of the marital bedroom." *Id.* at 484-85. Mr. Justice Goldberg, concurring, held the right of marital privacy to be protected by the ninth amendment. *Id.* at 486-99 (*passim*).

Stanley v. Georgia, 394 U.S. 557 (1969), extended that protection beyond the confine of matrimony. *Stanley* held that the right of privacy found in the first and fourteenth amendments forbids prosecution for possession of obscene matter seized in the home. *Id.* at 564-65.

[68] The Senate Report states:

> [The right of privacy] would . . . permit a separation of the sexes with respect to such places as public toilets, as well as sleeping quarters of public institutions.

S. REP. NO. 689, *supra* note 4, at 12. *See also House Hearings, supra* note 52, at 40, 402-06; *Senate Hearings, supra* note 52, at 303-04; 117 CONG. REC. 35809 (1971) (remarks of Congressman Ashley); 118 CONG. REC. 9336 (1972) (remarks of Senator Gurney). The

nizing the right of privacy with the ERA ensures that privacy in matters most fundamental to human dignity and individuality will be preserved. Most commentators are in agreement that, upon ratification, the ERA will become a part of the whole Constitution, integrated into the constitutional framework.[69] Although the subtleties of this interplay must evolve through constitutional litigation, prior judicial pronouncements provide a helpful basis for analysis.

To protect privacy rights, the Supreme Court initially employed a case-by-case analysis which resulted in plenary protection of specific types of conduct in specific contexts.[70] Then, in *Roe v. Wade*,[71] the Court apparently broadened its concept of privacy, establishing a more generally applicable test by which to scrutinize intrusive conduct. Developing the privacy right as protected by the due process clause of the fourteenth amendment, Mr. Justice Blackmun, writing for the majority, noted:

> The Constitution does not explicitly mention any right of privacy. In a line of decisions, however, going back perhaps as far as *Union Pacific R. Co. v. Botsford*, 141 U.S. 250, 251 (1891), the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. . . . These

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Senate, believing it to be superfluous, rejected an amendment expressly preserving the right of privacy. 118 CONG. REC. 9529-31 (1972).

[69] 118 CONG. REC. 9530 (1972) (remarks of Senator Bayh quoting Norman Dorsen, Professor of Law, New York University School of Law). Senator Ervin argued that rules of constitutional construction require invalidation of all existing constitutional provisions inconsistent with later amendments. S. REP. No. 689, *supra* note 4, at 46 ("minority views" of Senator Ervin); 118 CONG. REC. 9564 (1972) (remarks of Senator Ervin quoting Dr. Jonathan H. Pincus, Professor of Neurology, Yale Medical School). *See, e.g.*, Board of Lake County Comm'rs v. Rollins, 130 U.S. 662, 670-72 (1880).

The counterargument is that since the ERA and the right of privacy are not inconsistent they should be harmonized as Congress intended. Eastwood, *The Double Standard of Justice: Women's Rights Under the Constitution*, 5 VAL. U.L. REV. 281, 317 (1971); Emerson, *supra* note 4, at 900-02; *Symposium—Men, Women, and the Constitution: The Equal Rights Amendment*, 11 COLUM. J.L. & SOC. PROB. 77, 102 (1973); Ferrel, *supra* note 4, at 868-69; Comment, *The Equal Rights Amendment and the Right of Privacy*, 23 EMORY L.J. 197 (1974); *see, e.g.*, Ullmann v. United States, 350 U.S. 422, 428 (1956); Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 657, 723-26 (1838); Cohens v. Virginia, 15 U.S. (6 Wheat.) 264, 298 (1821). *But see* Freund, *supra* note 38, at 234, 240-41 (1971). *See generally* Comment, *The Constitutional Right of Privacy: An Examination*, 69 NW. U.L. REV. 263 (1974). *See also* Note, *The Sexual Segregation of American Prisons*, 82 YALE L.J. 1229 (1973).

[70] *See* Eisenstadt v. Baird, 405 U.S. 438, 453-54 (1972); *id.* at 463-65 (White, J., concurring in result); Stanley v. Georgia, 394 U.S. 557, 564-65 (1969); Loving v. Virginia, 388 U.S. 1, 12 (1967); Prince v. Massachusetts, 321 U.S. 158, 166 (1944); Skinner v. Oklahoma, 316 U.S. 535, 541-42 (1942); Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925); Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

[71] 410 U.S. 113 (1973).

> decisions make it clear that only personal rights that can be deemed "fundamental" or "implicit in the concept of ordered liberty," *Palko v. Connecticut*, 302 U.S. 319, 325 (1937), are included in this guarantee of personal privacy.[72]

The Court's citation of *Botsford*,[73] evinces an intent to elevate bodily privacy to the level of a fundamental right protected under the due process clause of the fourteenth amendment.[74] In *Botsford*, the Court noted:

> The inviolability of the person is as much invaded by a compulsory stripping and exposure as by a blow. To compel anyone, . . . to lay bare the body, . . . without lawful authority, . . . is an indignity. . . .[75]

Thus, a conflict will arise when the right to privacy of the body abuts with the governmental goal of eradicating sex discrimination. This conflict must be resolved by a balancing test, under which, the government may justify intrusive conduct only by showing a paramount interest. Since the *Roe* Court recognizes that even the right to bodily privacy is not unqualified, we must assume a balancing approach[76] and then determine what weight these competing interests are to be given.[77]

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[72] *Id.* at 152.

[73] Union Pac. Ry. v. Botsford, 141 U.S. 250 (1891).

[74] Roe v. Wade, 410 U.S. 113, 152 (1973); *cf.* Katz v. United States, 389 U.S. 347 (1967). *See generally* Heymann & Barzelay, *The Forest and the Trees:* Roe v. Wade *and Its Critics*, 53 B.U.L. REV. 765 (1973); Note, *On Privacy: Constitutional Protection for Personal Liberty*, 48 N.Y.U.L. REV. 670 (1973).

[75] Union Pac. Ry. v. Botsford, 141 U.S. 250, 252 (1891). In a more recent case, York v. Story, 324 F.2d 450 (9th Cir. 1963), *cert. denied*, 376 U.S. 939 (1964), the Ninth Circuit, confronted with a novel attack upon police activity, held that allegations of coerced "stripping" made by a female assault victim stated a civil cause of action under a provision of the Civil Rights Act. *Id.* at 452-56. The court reasoned that the due process clause of the fourteenth amendment protected "one's privacy against arbitrary intrusion by the police." Continuing, the court stated:

> We cannot conceive of a more basic subject of privacy than the naked body. The desire to shield one's unclothed figure from view of strangers, and particularly strangers of the opposite sex, is impelled by elementary self-respect and personal dignity.

Id. at 455.

[76] Roe v. Wade, 410 U.S. 113, 154 (1973). The Court concluded that "the right of personal privacy . . . is not unqualified and must be balanced against important state interests in regulation." *Id.* Mr. Justice Goldberg's concurring opinion in *Griswold* agreed that a balancing test is the proper approach. Griswold v. Connecticut, 381 U.S. 479, 486 (1965); Emerson, *supra* note 4, at 900; *cf.* Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U.L. REV. 962, 1004 (1964).

[77] Emerson succinctly concludes that

> the right of privacy would justify police practices by which a search involving the removal of clothing could be performed only by a police officer of the same sex as the person searched. Similarly, the right of privacy would permit the separation of the sexes in public restrooms, segregation by sex in sleeping

Though not unqualified, the right to bodily privacy, in Emerson's view, is substantial and is not to be easily outweighed by the governmental interest in preventing sex discrimination.[78] Therefore, in the absence of an express waiver of this right by each potential user of public accommodations such as restrooms, separate facilites would have to be provided. In most instances direct conflict between the two principles is avoidable, as, for example, through the use of restroom facilities such as those provided on airplanes.

Under the ERA, voluntary waivers[79] of individual privacy could result in mingling of the sexes, but when all persons within the unit voluntarily waive their privacy rights the results are not onerous. In the case of public accommodations the requisite waiver would be difficult to obtain since each potential user would be required to waiver his or her separate right of privacy. Thus, everyone with a right to use a particular restroom facility must freely waive his or her privacy rights prior to creation of a facility available to both sexes. The scope of the waiver task and prevailing sexual mores serve to moot the waiver issue except where a small group of persons desire to use facilities reserved exclusively for that group.[80]

Since waiver of the privacy right is permissible,[81] some commentators argue that, for example, prisoners might waive their privacy rights and demand integration of cell blocks.[82] Professor Emerson's House testimony reasons this inapplicable:

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quarters or prisons or similar public institutions, and appropriate segregation of living conditions in the armed forces.

Emerson, *supra* note 4, at 901 (footnote omitted).

[78] *House Hearings, supra* note 52, at 405.

[79] The standard of knowing and voluntary waiver, first set out in Johnson v. Zerbst, 304 U.S. 458 (1938), applies only "to those rights which the Constitution guarantees to a criminal defendant in order to preserve a fair trial." Schneckloth v. Bustamonte, 412 U.S. 218, 237 (1973) (footnote omitted).

Assuming arguendo that maintenance of separate sex-segregated restrooms is deemed a violation of the ERA, the usual solution employed on airplanes, trains, and buses would alleviate any difficulty from the result.

[80] As a cautionary note it should be emphasized that the government in its host function should be held under a duty to provide facilities which maximize integration of the sexes to, but not beyond, the very brink of conduct intruding upon the individual's fundamental privacy.

[81] Lovisi v. Slayton, 363 F. Supp. 620, 626-27 (E.D. Va. 1973).

[82] Freund, *supra* note 38, at 240-41. The waiver and first amendment freedom of expression arguments fail for the same reasons since the very nature of confinement is the result of a permissible legislative judgment that some past criminal or deranged activity justifies a withdrawal or attenuation of many rights. Price v. Johnson, 334 U.S. 266, 285 (1948); *House Hearings, supra* note 52, at 403-05 (testimony of Professor Emerson). Inmates do not lose all their constitutional rights, however, and the ERA might require certain mingling of the sexes in public institutions, Note, *supra* note 69, at 1266, but it should not require cohabitation. *Id.* at 1259.

> I don't think the right of privacy would affect . . . [regulations prohibiting cohabitation in prisons].
>
> The same thing is true of the first amendment. It doesn't mean that a prisoner in a jail can go out and make a speech. If you are incarcerated, you lose certain of your constitutional rights, and the right of cohabitation presumably is one of them. That has nothing to do with the right of privacy.[83]

When separation by sex is attacked as violative of the ERA, the party seeking to sustain the separate treatment should have the initial burden of proving infringement upon "fundamental" privacy interests before forcing both sexes to use separate facilities.[84] Moreover, even when separation is justified, the facility for each sex "would have to be equal in quality, convenience and other respects."[85] Therefore, a state-supported school could not refuse admission to members of one sex because it did not want to provide them separate but equal sleeping quarters or restrooms.[86]

Disproportionate focus upon the privacy issue diverts attention from the importance and probable effect of the amendment. Critics who raise the argument that upon ratification of the ERA men and women will be forced to use the same public restrooms, ignore the clear expression of congressional intent and judicial pronouncements that privacy is a paramount right in closely analogous circumstances.[87] Harmonizing the essential purposes of these two doctrines results in a workable arrangement which preserves privacy and human dignity through sex segregation; yet it does not compromise the basic thrust of the ERA.

II. The ERA and the Mississippi Criminal Code

Most of Mississippi's criminal laws would not be jeopardized by the ERA since both sexes are held equally accountable for the proscribed activity.[88] Generally only those crimes involving sexual acts will be af-

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[83] *House Hearings, supra* note 52, at 404.

[84] The party claiming exemption from humanitarian, remedial statutes serving important public purposes rightfully has the burden of proving legitimate grounds for the exception. A.H. Phillips, Inc. v. Walling, 324 U.S. 490, 493 (1945); Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228, 232 (5th Cir. 1969).

[85] Emerson, *supra* note 4, at 901.

[86] This proscription uniformly applies to public schools. Its effect upon "private" institutions depends upon the presence of state action vel non. *See* Emerson, *supra* note 4, at 907 n.64; Ferrell, *supra* note 4, at 864-65. Therefore, "sweetheart" arrangements whereby the school undergirds otherwise private discriminatory clubs, fraternities, sororities, or other organizations would come under challenge. *See* Golden v. Biscayne Bay Yacht Club, 521 F.2d 344 (5th Cir.), *rehearing en banc granted*, No. 74-1349 (Nov. 19, 1975).

[87] S. Rep. No. 689, *supra* note 4, at 12.

[88] *See, e.g.*, Miss. Code Ann. §§ 97-3-15 to -47 (1972) (homicide); Miss. Code Ann.

fected, and for the most part, simple rewording of the statute applying its proscription to both men and women suffices to satisfy the ERA.[89] In the 2 years between ratification and effective date[90] the Mississippi Legislature must assume responsibility for revising laws which conflict with the ERA. With criminal laws the need for revision exists.[91] Traditional notions of "fundamental fairness"[92] and the "judicial function"[93] require courts to enforce a criminal statute as written rather than to extend its coverage to the unincluded sex.[94] Thus, the courts should nullify under-inclusive criminal statutes even though resulting in the impossibility of conviction rather than construing them as sex-neutral by judicial gloss.[95]

Existing laws of various states provide for disparate treatment of men and women in a number of ways. Some make the sex of the perpetrator[96] or victim[97] an essential element of the crime. Others allow both sexes to be perpetrators or victims but subject them to different periods for sentencing[98] or degrees of protection.[99] If a statute is discriminatory

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§§ 97-7-1 *et seq.* (1972) (crimes against the government); MISS. CODE ANN. §§ 97-17-1 to -13 (1972) (arson); MISS. CODE ANN. § 97-17-19 to -37 (1972) (burglary). A person of either sex may commit these offenses.

[89] "The revision necessary often will be as simple as substituting the word person for a sex-defining word." Ferrell, *supra* note 4, at 878; *accord, Senate Hearings, supra* note 52, at 384; Emerson, *supra* note 4, at 961.

[90] H.R.J. Res. 208; S.J. Res. 8, 92d Cong., 1st Sess. (1971), provides that the amendment will take effect 2 years after ratification.

[91] *See* ABC Interstate Theaters, Inc. v. State, 325 So. 2d 123 (Miss. 1976).

[92] *See, e.g.*, Scull v. Virginia, 359 U.S. 344, 353 (1959).

[93] Hatton v. State, 92 Miss. 651, 654, 46 So. 708, 709 (1908).

[94] United States v. Clark, 412 F.2d 885, 990 (5th Cir. 1969); Chappel v. United States, 270 F.2d 274, 278 (9th Cir. 1959); Attala Loans, Inc. v. Standard Discount Corp., 249 Miss. 282, 299, 161 So. 2d 631, 638 (1964); King v. Mississippi Power & Light Co., 244 Miss. 486, 494, 142 So. 2d 222, 225 (1962); State v. Winslow, 208 Miss. 753, 760, 45 So. 2d 574, 575 (1950); State v. Lee, 196 Miss. 311, 315, 17 So. 2d 277, 278 (1944); Hatton v. State, 92 Miss. 651, 654, 46 So. 708, 709 (1908). *See generally* 73 AM. JUR. 2d *Statutes* § 409 (1974); 22 C.J.S. *Criminal Law* § 24(2) (1961); 3 J. SUTHERLAND, STATUTES & STATUTORY CONSTRUCTION ch. 56 (1972).

[95] Emerson, *supra* note 4, at 915, 954; Ferrell, *supra* note 4, at 870; *see Senate Hearings, supra* note 52, at 369-90.

[96] *See, e.g.*, Burchfield v. State, 277 So. 2d 623 (Miss. 1973) (construing voyeurism, MISS. CODE ANN. § 97-29-61 (1972), as a "male only" crime); Love v. State, 211 Miss. 606, 52 So. 2d 471 (1951) (construing lustful touching of children, MISS. CODE ANN. § 97-5-23 (1972), as a "male only" crime). *See also* MISS. CODE ANN. § 97-11-13 (1972), holding a male public official, but not a female public official, criminally accountable for his spouse's accepting a bribe.

[97] *See, e.g.*, Lang v. State, 230 Miss. 147, 87 So. 2d 265 (1965) (construing Mississippi's rape statute, MISS. CODE ANN. § 97-3-65 (1972), as requiring that only a female can be the victim).

[98] *See, e.g.*, ME. REV. STAT. ANN. tit. 34, §§ 802 (men), 853-54 (women) (Supp. 1974). Mississippi has no statute authorizing disparate sentencing.

in one of these ways and does not fall within an exception to the ERA, the legislature would be compelled to redraft it in sex-neutral terms or repeal it.[100]

With few exceptions, significant problems arise when legislatures define certain sexual activity as criminal. Many of these laws were drawn at a time when women were considered naive and in need of statutory protection from unscrupulous males,[101] and legislatures, acting today, might simply repeal them.[102] When the statute deals with an activity the legislature wishes to continue to deem criminal, such as child molesting, the statute could be rewritten so that the criminal activity, its perpetrators, and its victims would be defined in the essential terms of the offense rather than according to social stereotypes.[103]

A. Sexual Assault

Most laws regulating the various forms of sexual assault basically entail touching[104] with carnal intent[105] achieved by force[106] or deception.[107] Much confusion and overlap could be prevented in this troublesome area of the criminal law by punishing the sexual act on the basis of functional elements rather than on impermissible sex-based distinctions.

Critics often question whether rape laws will survive ERA scrutiny. This is a red herring.[108] The ERA need not cause the per se invalidation of all rape statutes,[109] since two permissible alternatives exist: the statutory definition of the crime can either be made sex neutral or defined

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[99] *See, e.g.*, MISS. CODE ANN. § 97-5-7 (1972) (protecting unmarried males until age 21 and unmarried females until age 18 from being enticed into employment without parental consent).

[100] *See* Note, *supra* note 57, at 471-72.

[101] *Id.* at 473-89.

[102] Statutes which might be repealed include MISS. CODE ANN. § 97-29-55 (1972) (criminalization of seduction of a female over age 18 by promise to marry); MISS. CODE ANN. § 97-35-11 (1972) (using abusive, profane, vulgar, or indecent language in the presence of a female may be a misdemeanor).

[103] Emerson, *supra* note 4, at 960-61.

[104] "Touching" ranges from rape, MISS. CODE ANN. § 97-3-65 (1972), to licentious handling, MISS. CODE ANN. § 97-5-23 (1972).

[105] "Carnal intent" ranges from intent to rape, MISS. CODE ANN. § 97-3-71 (1972), to nonorgasmic lust gratification, MISS. CODE ANN. § 97-5-23 (1972).

[106] Force can be physical effort sufficient to subdue an unwilling victim, MISS. CODE ANN. § 97-3-65 (1972), or assault with intent to rape, MISS. CODE ANN. § 97-3-71 (1972).

[107] Deception resulting in sexual relations usually relates to the crime of seduction. *See, e.g.*, MISS. CODE ANN. § 97-29-55 (1972).

[108] Ferrell, *supra* note 4, at 878. *See also* S. REP. No. 689, *supra* note 4, at 16.

[109] Emerson, *supra* note 4, at 955-56; Ferrell, *supra* note 4, at 878.

so that its classification is based on a physical characteristic unique to one sex.[110]

In Mississippi rape is defined as the forcible ravishing of any female above the age of 12 years without her consent.[111] An essential element of the crime is some degree of penetration.[112] Under the present statutory definition only a man can commit the crime and only a woman can be the victim.[113] If the legislature desires to continue this statutory scheme, the present statute may be rewritten in terms of unique physical characteristics of men and women.[114] Once a prima facie case for the unique physical characteristic exception has been made out, the court's proper inquiry is to determine whether the law "bears the necessary close relationship to a unique physical characteristic . . . ."[115]

Another approach would be to redefine the crime as proscribing any forced sex act.[116] For example, a consolidation of rape and sodomy into one statute could protect all persons from non-consensual sexual abuse.[117] Statutory references to the sex of the perpetrator and victim

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[110] Emerson, *supra* note 4, at 955-56.

[111] MISS. CODE ANN. § 97-3-65 (Supp. 1975). *See also* Wilson v. State, 221 So. 2d 100 (Miss. 1969).

[112] Green v. State, 270 So. 2d 695 (Miss. 1972); Lang v. State, 230 Miss. 147, 87 So. 2d 265, *cert. denied*, 352 U.S. 936 (1956); R. PERKINS, CRIMINAL LAW 155 (1969). For an enlightening discussion of the evolution of rape laws, see S. BROWNMILLER, AGAINST OUR WILL—MEN, WOMEN AND RAPE 16-30 (1975).

[113] Green v. State, 270 So. 2d 695 (Miss. 1972).

[114] The following are examples of such statutes:

MODEL RAPE STATUTE I

Every male who shall have been convicted of rape by forcibly penetrating a female's vagina with his penis and without her consent; or by administering to her any substance or liquid which shall produce such stupor or such imbecility of mind or weakness of body as to prevent effectual resistance, shall suffer . . . (penalty).

MODEL RAPE STATUTE II

Every person who shall be convicted of rape, either by forcibly penetrating any other person's vagina or anus without consent, or by forcing another to perform without consent a sexual act whether intercourse per anum, per os, or vaginal intercourse shall suffer . . . (punishment).

Administering any substance or liquid which shall produce such stupor or such imbecility of mind or weakness of body as to prevent effectual resistance shall not be deemed consent for purposes of this section.

[115] *See* Conlin, *Equal Protection Versus Equal Rights Amendment—Where Are We Now?*, 24 DRAKE L. REV. 259, 312-13 (1975).

[116] *Id.*

> All acts of sex forced on unwilling victims deserve to be treated in concept as equally grave offenses in the eyes of the law, for the avenue of penetration is less significant than the intent to degrade.

S. BROWNMILLER, *supra* note 112, at 378.

[117] Recognizing the logical consistency of this approach, some states have eliminated sex identification from their laws proscribing sexual assault. *See* FLA. STAT. ANN. §§ 794.01-.05 (Supp. 1975-1976); MICH. COMP. LAWS ANN. §§ 750.520a-.520 (Supp. 1975-1976).

would disappear, thus including both men and women as perpetrators and victims.[118]

B. *Statutory Rape*

Statutory rape proscribes sexual liaisons with persons deemed legally incapable of consent.[119] Statutory rape in Mississippi consists of either a male's "carnally and unlawfully knowing a female child under the age of twelve years"[120] or a male's "carnal knowledge of any unmarried female person of previously chaste character younger than himself, and over twelve (12) years and under eighteen (18) years . . . ."[121]

Defining the crime of statutory rape in this manner presumes that young women are more susceptible to sexual inducements by older males than the converse; it further presumes that the resulting sexual liaison is far more calamitous to a young woman's psyche than to a young man's. Physiological differentiation based upon such sexual stereotypes, however, is banned under the ERA. Therefore Mississippi's statutory rape laws could not withstand ERA scrutiny. As with the rape statutes, however, they could be rewritten in terms of unique physical characteristics, or they could be rewritten to include both sexes as perpetrators and as victims.

C. *Seduction*

If the victim is over 18 years of age, seduction is limited to carnal knowledge of a previously chaste female achieved through a false promise to marry or through a feigned marriage.[122] Since this statute creates a crime in which only males are the perpetrators and only females are the victims, the statute would fall under the ERA. Evolving social mores may dictate that this crime be abolished leaving the more serious aspects to be punished under sex-neutral kidnap,[123] rape, or unlawful restraint laws.[124]

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[118] *See, e.g.*, Iowa Proposed Code ch. 1, § 218, *cited in* Yeager, *Crimes Against the Person: Homicide, Assault, Sexual Abuse and Kidnapping in the Proposed Iowa Criminal Code*, 60 IOWA L. REV. 503, 521 (1975).

[119] Brooks v. State, 242 So. 2d 865, 867 (Miss. 1971); Lewis v. State, 183 Miss. 192, 201, 184 So. 53, 54 (1938); R. PERKINS, *supra* note 112, at 152-53.

[120] MISS. CODE ANN. § 97-3-65 (Supp. 1975).

[121] *Id.* § 97-3-67 (1972).

[122] *Id.* § 97-29-55.

[123] Abduction of females over 14 years of age is a crime in Mississippi. *See id.* § 97-3-1; Tyler v. State, 178 Miss. 340, 173 So. 413 (1937); Lampton v. State, 11 So. 656 (Miss. 1892). Although the statute, as written, would violate the ERA, it could be amended to criminalize the abduction of "any person." This proscription is already preserved in the sex-neutral kidnapping statute. MISS. CODE ANN. § 97-3-51 (1972).

[124] Emerson, *supra* note 4, at 959.

Seduction of and sexual contact with children by older persons is still an area of legislative concern.[125] The legislature, therefore, should give consideration to drafting a sex-neutral statute to protect youngsters from all forms of sexual contact.[126] Since the essential offense is unwarranted sexual contact, the statutory proscription must sweep broadly to cover all types. Protection from homosexual contact[127] accrues as an additional benefit when the statute is properly drawn.[128] Regardless of sex, a child would be protected from licentious abuse from older men or older women or both.[129]

D. Consensual Sexual Relations

Mississippi penalizes a variety of consensual sexual acts performed in private by persons above the age of consent. Although the propriety of this scheme may be questioned on other grounds,[130] most such prohibitions are sex-neutral and, therefore, are not violative of the ERA.[131] Authorities disagree on the effect the ERA might have on laws banning homosexual activity and homosexual marriages. Proponents contend that the ERA does not preclude the legislative judgment that certain types of activity should be made criminal. It requires only that criminal activity be defined in a functional manner which does not result in disparate treatment based on impermissible gender classification.[132]

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[125] *See* S. BROWNMILLER, *supra* note 112, at 271-82.

[126] Consideration should be given to lowering the age of consent to bring the crime in line with modern social reality. The following example of a sex-neutral statute is designed to replace MISS. CODE ANN. §§ 97-3-1, 97-5-23 (1972).

MODEL SEDUCTION STATUTE

Any person, older than the victim, who shall seduce or have sexual contact with any child under the age of ____ of previous chaste character, shall upon conviction . . . (punishment), but the testimony of the person seduced shall not in itself be sufficient for conviction.

[127] For the purposes of this comment, the word "homosexual" embraces both sexual contact between two males and between two females.

[128] *See* Iowa Proposed Code ch. 1, § 218, *cited in* Yeager, *supra* note 118, at 521.

[129] In providing for punishment it is permissible for the legislature to place a heavier penalty on homosexual contact than on heterosexual contact. This is a judgment traditionally left to lawmakers and it does not contravene the ERA since it is not a sex-based classification within the meaning of the ERA. See note 132 *infra*.

[130] Stone v. Wainwright, 478 F.2d 390, 393 (5th Cir.), *rev'd*, 414 U.S. 21 (1973)(vagueness); Cotner v. Henry, 394 F.2d 873, 875-76 (7th Cir. 1968)(vagueness). *But see* Rose v. Locke, 96 S. Ct. 243 (1975).

[131] Under most statutes both sexes are subject to equal criminal penalties. *See, e.g.*, MISS. CODE ANN. § 97-29-1 (cohabitation or habitual fornication); § 97-29-13 to -15 (bigamy and exceptions to bigamy); § 97-29-27 to -29 (1972) (incest).

[132] The equal rights amendment would not prohibit a State from saying that the institution of marriage would be prohibited to men partners. It would not prohibit a State from saying the institution of marriage would be prohibited to

Thus, both sexes, when physically possible, must be legally able to commit (and be the victims of) the proscribed activity. Professor Emerson, adopting a different approach, suggests that laws banning homosexual activity and homosexual marriage could be upheld under the unique physical characteristic doctrine or a judicial determination that Congress did not intend to affect those laws dealing with homosexual activity.[133]

Critics reason, for example, that but for the sex of the partners two men must be granted the right to marry. Thus, citing *Loving v. Virginia*,[134] they contend that a state's denial of marriage to couples of the same sex constitutes the type of discrimination forbidden by the ERA.[135] In *Loving*, the Supreme Court, utilizing a fourteenth amendment analysis, found an impermissible racial classification in the denial of marriage licenses to members of different races although the denial affected both races equally.[136] Arguably, denial of marriage licenses to homosexual couples would, under the *Loving* logic, appear to be an impermissible sex classification.

This argument, however, ignores the fundamental issue involved: whether the institution of marriage defined as a union between a man and a woman must be redefined.[137] A challenge to the definition of permissible types of unions was presented in *Reynolds v. United States*,[138] where the court upheld a criminal polygamy statute against a Morman's first amendment free exercise challenge. Two arguments can be posited to undergird the assertion that denial of the marriage union to homosexuals is not sex discrimination: (1) Redefinition of entry requirements to the marital union is a legislative judgment, (2)

> women partners. All it says is that if a State legislature makes a judgment that it is wrong for a man to marry a man, then it must say it is wrong for a woman to marry a woman—or if a State says it is wrong for a woman to marry a woman, then it must say that it is wrong for a man to marry a man.

118 CONG. REC. 9314, 9331 (1972) (remarks of Senator Bayh). Senator Bayh would apply the same rationale to statutes banning homosexual activity:

> [T]he equal rights amendment does not prohibit a State from saying it shall be against the law of the State for any citizens therein to participate in a homosexual act—period. What the equal rights amendment does prohibit is for a State to say that if women participate in homosexuality, that is bad, but if men participate in homosexuality, that is all right.

Id.

[133] *House Hearings, supra* note 52, at 402; Emerson, *supra* note 4, at 961.

[134] 388 U.S. 1 (1967).

[135] *See* Note, *The Legality of Homosexual Marriage*, 82 YALE L.J. 573, 583-88 (1973).

[136] Loving v. Virginia, 388 U.S. 1, 12 (1967).

[137] Ferrell, *supra* note 4, at 881.

[138] 98 U.S. 45 (1878); *see* Ferrell, *supra* note 4, at 880-82; *cf.* Baker v. Nelson, 291 Minn. 310, 191 N.W.2d 185 (1971), *appeal dismissed*, 408 U.S. 810 (1972).

Congress did not intend the ERA to change the traditional concept of marriage.[139]

Mississippi's statute dealing with "unnatural intercourse" is written in sex-neutral terms[140] but has been construed to require "penetration of the body."[141] If only males are considered capable of this act, the statute might withstand ERA scrutiny under Emerson's approach by falling within the unique physical characteristic exception.[142] Convicting a person for permitting penetration to occur—a passive act—would be sustained since both men and women are equally accountable for the illicit activity. The legislature should revise the statute to bar all acts of unnatural intercourse.[143] Such an interpretation would not violate the ERA since the prohibition would attach to the sexual act rather than to the gender of the individual.

The statute forbidding fornication between a male teacher and his female pupil,[144] however, would be impermissibly underinclusive since the same activity between a female teacher and her male pupil is not forbidden.[145] A permissible statute would simply proscribe such conduct between a teacher and pupil. Although both participants are subject to a fine for each offense, the teacher may be imprisoned for up to 6 months for each offense. This type of sentencing disparity is sustainable since it rests not on a sex-based differentiation but rather on a legislative judgment that the authority figure should suffer the greater punishment.[146]

E. Prostitution

Mississippi's prostitution statute[147] is written in sex-neutral terms

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[139] Ferrell, *supra* note 4, at 882.

[140] MISS. CODE ANN. § 97-29-59 (1972).

[141] State v. Hill, 179 Miss. 732, 176 So. 719 (1937). *See also* State v. Davis, 223 Miss. 862, 79 So. 2d 452 (1955).

[142] Emerson, *supra* note 4, at 961.

[143] MODEL UNNATURAL INTERCOURSE STATUTE

> Every person who shall be convicted of the detestable and abominable crime against nature . . . (punishment).
>
> For purposes of this section a detestable and abominable crime against nature consists of any oral-genital contact, any oral-anal contact, intercourse per anum, or any form of sexual contact with a beast.

A statute specifying exactly what activity is proscribed carries the additional benefit of avoiding challenges based upon vagueness. *See* Locke v. Rose, 514 F.2d 570 (6th Cir.), *rev'd*, 96 S. Ct. 243 (1975).

[144] MISS. CODE ANN. § 97-29-3 (1972).

[145] A similar analysis applies to the prohibition of fornication between a male guardian and his female ward. MISS. CODE ANN. § 97-29-7 (1972).

[146] *See* Emerson, *supra* note 4, at 964.

[147] MISS. CODE ANN. § 97-29-49 (1972).

and could be applied to both male and female prostitutes as well as to customers. While some jurisdictions have defined prostitution as an act which can be committed only by a female,[148] the issue has never been presented to the Mississippi Supreme Court. However, Mississippi's statute prohibiting procuring a female for purposes of prostitution[149] would have to be redrawn should the ERA be ratified. Prostitution-related offenses (for example, maintaining a house of prostitution, transporting a prostitute)[150] are described in sex-neutral terms and would be unaffected by the ERA.

F. Male-Only Crimes

Voyeurism, a male-only crime, consists of entry upon another's premises and peeping into a structure for "the lewd, licentious and indecent purpose of spying on the occupants."[151] As a "male-only" crime, it ignores the fact that women can commit the elements of the offense. In *Green v. State*,[152] the Mississippi Supreme Court upheld this statute against a sex discrimination challenge. Appellant contended that the statute punishing males only for a crime both sexes could commit constituted an arbitrary scheme with no rational justification. This argument was summarily rejected by the court which held that, under the traditional "rational justification" test triggered by the fourteenth amendment, the classification "has a sound basis in the physical and psychological difference between men and women . . . ."[153] A similar challenge to the statute under the ERA would yield invalidation, since the discriminatory provision is based upon perceived social differences between the sexes rather than on any physical characteristic unique to one sex. Similarly, Mississippi's "tramp" statute forbids non-blind males over 16 years of age from "stroll[ing] over the country without lawful occasion."[154] If retention of this statute is desired, the proper approach is to redraw it in sex-neutral terms.

Another statute holds a father criminally responsible for the posses-

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[148] A composite of commonly employed judicial definitions holds that prostitution consists of a female offering "her body to indiscriminate sexual activity for hire." Rosenbleet & Pariente, *The Prostitution of the Criminal Law*, 11 AMER. CRIM. L. REV. 373, 381 (1973); *see* 73 C.J.S. *Prostitution* § 1 (1951). Thus in most jurisdictions only women, by definition, can commit prostitution. Emerson, *supra* note 4, at 962. Statutes dealing with prostitution variously proscribe "status," "activities," or "negotiations." Rosenbleet & Pariente, *supra* at 422-27.

[149] MISS. CODE ANN. § 97-29-51 (1972).

[150] *Id.* § 97-29-49.

[151] *Id.* § 97-29-61.

[152] 270 So. 2d 695 (Miss. 1972).

[153] *Id.* at 697.

[154] MISS. CODE ANN. § 97-35-29 (1972).

sion of a deadly weapon by his son under 16 years.[155] The statute would be infirm on two easily correctable grounds. First, the father rather than the mother is held criminally responsible. Second, no liability attaches to the same conduct by female children; therefore the statute would be impermissibly underinclusive. A permissible construction would hold either parent liable for the conduct of children of either sex.

Sex discrimination is multidimensional. Its most pernicious and subtle forms result from sex-neutral classifications falling more heavily on one sex. Emerson suggests that when confronted with this type of discrimination, the proper analysis is to scrutinize closely the practice in terms of purpose, practical operation, and effect.[156] The judicial standards appropriate for this determination are those used when determining the validity of classification based upon a physical characteristic unique to one sex.[157] Additionally, sex discrimination in enforcement of laws and official policies is forbidden by the ERA. An examination of analogous incidents of judicial recognition of racially discriminatory enforcement provides insight to the instant problem.[158] Discussion of evidentiary complexities and substantial burden of proof is beyond the scope of this work.[159]

Conclusion

Ratification of the ERA would transform our legal system into one recognizing a unitary system of rights and responsibilities. Any dualistic structure based upon the irrelevant sex factor, whether benign or malignant in purpose, would be prohibited. Ratification should not, as remonstrants fear, create a unisex society, since the ERA should have no direct effect upon private or social relations. Furthermore, the proposed amendment does not require that functional physical differences in the sexes necessitating different treatment of men and women be disregarded. The ERA would end the state's power to preclude individual choice through arbitrary barriers in the form of sex-based irrebuttable presumptions. Since the ERA's impact on Mississippi's criminal statutes can readily be determined, should ratification occur, revisions necessary to continue the legislative purpose behind the laws may be made in a rational manner.

Norman Albert Mott III

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[155] *Id.* § 97-37-15.

[156] Emerson, *supra* note 4, at 898-900.

[157] See notes 54 through 64 and accompanying text *supra*.

[158] *See, e.g.*, Yick Wo v. Hopkins, 118 U.S. 356 (1886) (race-based discrimination).

[159] For an insight into the problems of proving discriminatory enforcement, see Oyler v. Boles, 368 U.S. 448 (1962).

THE FUEL ADJUSTMENT CLAUSE AND ITS ROLE IN THE REGULATORY PROCESS

An automatic fuel adjustment clause (FAC) in an electric utility company's tariff schedule allows the company to pass through to its customers automatically, without a rate hearing, that portion of the cost of its electric power which results from increased fuel costs. Proponents of FAC's traditionally viewed such clauses as a solution to the "regulatory lag" problem during inflationary periods when rapidly rising fuel costs had an adverse impact on the companies' rates of return.[1] One authority, writing in 1958, took a sanguine view of the future of automatic adjustment clauses:

> Every political jurisdiction in this country has escalator clauses in the published tariffs of its utilities . . . .
>
> . . . .
>
> [T]he now virtually universal acceptance of escalation based on certain cost elements should lead eventually to adoption of this procedure on a broadened scale. The results will be reduced costs of administration and litigation, greater correlation of utility rates with general economic trends, and greater stability for the regulated industry.[2]

Today, the status of automatic adjustment clauses is more controversial, if not more problematic. The inflationary spiral of the 1970's, and especially the Arab oil boycott in the fall of 1973, has had a disastrous effect on the regulated electric utility industry. Rate relief has not been able to keep pace with rising interest rates and the rapidly increasing costs of wages, fuel, and other products. The result has been a sharp drop in utility companies' stock prices, with most utility issues now selling substantially below book value.[3]

The Federal Power Commission reacted to the utilities' plight by allowing the use of automatic FAC's in all tariffs under its jurisdiction which were filed on or after January 1, 1975.[4] The President, in Title VII of the Omnibus Energy Bill, introduced in the Senate on Febuary 5, 1975, proposed a broadening of automatic escalator clauses. The bill would require, among other things, the use of FAC's by all regulatory commissions.[5]

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[1] *See* Brophy, *The Utility Problems of Regulatory Lag*, PUB. UTIL. FORT., Jan. 30, 1975, at 21.

[2] Trigg, *Escalator Clauses in Public Utility Rate Schedules*, 106 U. PA. L. REV. 965, 996-97 (1958).

[3] *See* Loomis, *For the Utilities, It's a Fight for Survival*, FORTUNE, Mar. 1975, at 97.

[4] 18 C.F.R. § 35.14 (1975).

[5] S. 594, 94th Cong., 1st Sess. (1975). Title VII of the Act would (1) limit suspensions of the proposed rate increases to 5 months; (2) require the use of FAC's by all regulatory commissions; (3) allow inclusion of construction work in progress and pollution

Just as the FAC has become critically important to the utility companies, it has also become important and highly visible to their customers. While in 1970 only 35 percent of regulated utilities had FAC's in rate schedules for their residential customers, by 1974 this figure had risen to 72 percent.[6] Electric and gas utility bills increased by almost $10 billion in 1974. Two-thirds of this increase resulted from the operation of fuel adjustment clauses.[7]

Senator Lee Metcalf of Montana, a leading critic of automatic FAC's, takes the "consumer" viewpoint:

> Such clauses are basically an abdication of the legislative regulatory authority which is the only protection standing between the consumer and unbridled monopoly power. In the case of fuel adjustment clauses, it amounts to self-regulation by utilities for over 50% of their operating expenses.[8]

And further:

> Administration and utility spokesmen continue to laud the fuel clauses. They even advocate expansion of automatic clauses to other operating expenses as well.
>
> The trend should be the other way. Automatic clauses remove basic issues from ratemaking. They encourage waste and profligacy—why economize on a cost if it can be automatically passed on?[9]

The purpose of this comment is to analyze the FAC and its role in the regulatory process. It will examine the problem of "regulatory lag" and the various forms that FAC's have taken in response to that problem. The arguments pro and con, both economic and legal, will be discussed. Special attention will be given to the FAC's currently approved by the Mississippi Public Service Commission for those utilities under its jurisdiction.

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control equipment in the rate base; and (4) allow reduced charges to customers for off-peak use of electricity. According to the National Association of Regulatory Utility Commissioners, the Act would add another 20 percent to utility customers' costs. 121 CONG. REC. S4964 (daily ed. March 24, 1975).

[6] Sarikas, *What is New in Adjustment Clauses*, PUB. UTIL. FORT., June 19, 1975, at 33.

[7] D. JONES & S. DOVELL, ELECTRIC AND GAS UTILITY RATE AND FUEL ADJUSTMENT CLAUSES INCREASES, 1974 at V, prepared for the SUBCOMMITTEE ON INTERGOVERNMENTAL RELATIONS AND THE SUBCOMMITTEES ON REPORTS, ACCOUNTING, AND MANAGEMENT OF THE SENATE COMMITTEE ON GOVERNMENT OPERATIONS, 94th Cong., 1st Sess., Mar. 27, 1975 (Comm. Print 1975, Stock number 052-070-02806-8).

[8] Letter from Hon. Lee Metcalf to the author, July 14, 1975, on file with the *Mississippi Law Journal*.

[9] 120 CONG. REC. E6529 (daily ed. Oct. 16, 1974).

I. The Regulatory Process and the Problem of Regulatory Lag

The rationale underlying the modern system of regulated utilities is that certain services, which are vested with a high public interest, could not function effectively without some protection from unbridled competition, either because their capital requirements are so great that adequate financing would be obtainable only in a low risk environment, or because of natural conditions, for example, the limited space available for street railways.[10] Given the need for such protection, the question which arises is whether ownership of the utility should be in the government or the private sector. Both forms exist today, often side by side, each protected by some measure of territorial exclusivity. It is with the privately owned utilities, however, that the modern regulatory system is concerned. In order to ensure the availability of effective service and in exchange for government protection, the privately owned utility is subject to extensive regulation of its rates, types of service, schedules, and even internal financial structure.[11]

The utilities are obligated to provide adequate service and, in exchange, are given the opportunity to earn a fair rate of return on property used and useful in providing the service.[12] This "fair rate of return" was defined by the United States Supreme Court in *Federal Power Commission v. Hope Natural Gas Co.*[13] as one which is just and reasonable both to investors and to customers, and which is sufficient for the company to operate successfully, maintain its financial integrity, attract capital, and compensate investors for the risks assumed.[14]

At the state level utilities are regulated, if at all, by agencies known variously as "Public Utilities Commissions" or "Public Service Commissions," or, in at least two states, as "Commerce Commissions."[15] Under the typical regulatory procedure, the utility company files its proposed tariff schedule (or rate schedule), and the commission holds hearings in which the company must establish the reasonableness of the requested rates.[16] A "test year" is defined, often the last preceding 12 months for which data is available. Recently several states, including Mississippi, have allowed a "forward looking" test year, with data estimates based on past experience.[17]

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[10] *See* Bonbright, Principles of Public Utility Rates (1961); 1 Priest, Principles of Public Utility Regulation (1969) (hereinafter cited as Priest).

[11] *See* Priest, *supra* note 10.

[12] *Id.*

[13] 320 U.S. 591 (1944).

[14] *Id.* at 605.

[15] *See* D. Jones & S. Dovell, *supra* note 7, at 31-38.

[16] *See* 1 Priest, *supra* note 10; F. Welch, Preparing for the Utility Rate Case (1954).

[17] Brief for Appellant at 33, Mississippi Power & Light Co. v. Mississippi Pub. Serv.

At the rate hearing, evidence is taken of the company's rate base (the property used and useful in providing the service), using either the company's year-end net plant assets or the average (mean) net plant assets.[18] It is on this rate base that the company must be allowed to earn a fair rate of return. Several criteria are used in determining "fairness":

(1) The rate of return should be comparable with rates of return for similar companies with similar risks, in the same area and time frame; and,

(2) It should be sufficient to ensure the company's financial soundness, to attract necessary capital, and to encourage good management and efficiency.[19] This rate of return, when applied to the company's rate base, should equal the projected net income (the gross revenues to be derived from the proposed rate increase less legitimate, "above the line" operating expenses, such as legitimate fuel costs). Traditionally, the company was required to justify these operating expenses before they could be passed to its customers in the new rates.[20]

The regulatory process described above has two disadvantages: it is expensive (in terms of data gathering, expert witness fees, and other litigation expenses); and it is relatively slow, extending from several months to several years, depending on whether an appeal from the commission's decision is taken. In Mississippi, Section 10 of the Public Utilities Act of 1956[21] requires that the Mississippi Public Service Commission make a determination within 6 months of the filing of the proposed schedule. Recognizing the injustice which may result from "regulatory lag," Mississippi and a number of other states provide for interim rate relief. The company is allowed to put its proposed tariff into effect before the rate hearing by filing a bond, conditioned upon refund to the customers, with interest, of any excess over the rates that are finally determined to be fair and reasonable.[22]

Comm'n, Chancery Court of the First Judicial District of Hinds County, Miss., No. 93,813 (1974).

[18] There are various ways by which the rate base can be valued: original cost, original cost less depreciation, "fair" (or current) value, or reproduction cost. The Mississippi Supreme Court discussed the statutory prescription "fair return on reasonable value" in Southern Bell Tel. & Tel. Co. v. Mississippi Pub. Serv. Comm'n, 237 Miss. 157, 113 So. 2d 622 (1959).

[19] Fed. Power Comm'n v. Hope Natural Gas Co., 320 U.S. 591, 603 (1944); Southern Bell Tel. & Tel. Co. v. Mississippi Pub. Serv. Comm'n, 237 Miss. 157, 241, 113 So. 2d 622, 656 (1959).

[20] As a general rule, electric utilities are permitted to pass through to their customers such "legitimate" operating expenses as taxes, maintenance and depreciation, wages, fuel and other supplies, "institutional" advertising costs, charitable donations, and "normal" power transmission losses. *See* 1 PRIEST, *supra* note 10, at 47-87.

[21] MISS. CODE ANN. § 77-3-39 (1972).

[22] *Id.*

In spite of such provisions allowing interim rate relief, the regulatory process, structured in terms of formal rate hearings, is inadequate to keep pace with rising costs in a period of "double-digit" inflation. This problem of "regulatory lag" was well described 25 years ago by the Virginia State Corporation Commission:

> When prices are rising, the time that necessarily elapses between the date when earnings fall below the permissible minimum rate of return and the date when the commission enters its order allowing increased rates, is a time during which the utility earns less than a fair and reasonable return . . . .
>
> The inevitable delay between the happening of an event that entitles a party to legal relief and the date when he gets relief makes it impossible in some kinds of cases for law and equity to do complete justice.[23]

II. The Fuel Adjustment Clause

Recognizing that interim rate relief provisions are not, in themselves, adequate to deal with the "regulatory lag" problem, Mississippi and most other states have authorized some form of automatic adjustment clause. The most widely used type has been the FAC. The earliest examples of FAC's were the "temporary" wartime clauses litigated during the inflationary period of the First World War.[24] In spite of opposition,[25] they were in widespread use by the mid-1920's.[26] By the end of World War II, they were generally accepted as part of the regulatory process, at least in commercial and industrial rate schedules.[27] It was not

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[23] Lynchburg Gas Co., 6 P.U.R.3d 33, 35-36 (Va. 1954), *additional opinion sub. nom.*, Virginia Elec. & Power Co., 7 P.U.R.3d 108 (Va. 1954), *aff'd sub. nom.*, Norfolk v. Virginia Elec. & Power Co., 197 Va. 505, 90 S.E.2d 140 (1955).

[24] Economics Division, Congressional Research Service, Report on Automatic Adjustment Charges in Electric Utility Rate Schedules, 120 Cong. Rec. S12505 (daily ed. July 16, 1974). The Illinois Public Utilities Commission was among the first to permit automatic adjustment clauses in its tariff schedules:

> The most equitable solution herein would seem to be the establishing of a basic rate for heat service determined upon the 1915-16 coal prices, with provision made for a variable rate differential (both up and down) predicated upon the future average cost of coal to the petitioner.

Re Alton Gas & Elec. Co., P.U.R. 1917F 12, at 21 (Ill. 1917). The New Hampshire Public Service Commission authorized an automatic clause the same month as did Illinois: "We find . . . making the rate vary with the price of coal . . . to be reasonable and just . . . ." *Re* Rockingham County Light & Power Co., P.U.R. 1917F 24, at 25 (N.H. 1917).

[25] *See, e.g.*, *Re* Muncie Elec. Light Co., P.U.R. 1917F 12, at 23 (Ind. 1917), in which the Indiana Commission refused to authorize a "graduated supplementary schedule" to pass through, as increased operating expenses, the wartime coal prices.

[26] Trigg, *supra* note 2, at 964.

[27] D. Jones & S. Dovell, *supra* note 7, at 1. Trigg points out that the early FAC's were limited to commercial and industrial schedules at the request of the utilities compa-

until quite recently, however, that FAC's were permitted in residential rate schedules. Mississippi authorized FAC's in certain electric utility schedules as early as 1954, 2 years before the modern Public Service Commission was established.[28]

Currently, more than 40 states have authorized some form of FAC in their utility tariffs.[29] Four states—Idaho, Montana, Oregon, and Wyoming—allow no FAC's.[30] Two states—Nebraska and Texas—do not regulate electric and gas utility rates at all.[31] At least eight states have statutory authorization for adjustment clauses,[32] but in most states FAC's have been authorized by their respective commissions without specific statutory authority. There are wide variations among the FAC's currently in use. In most states with FAC's, the clauses are automatic.[33] In four states—California, Florida, New Jersey, and Wyoming—hearings are required before the FAC increases can be passed through to consumers.[34] The Mississippi Public Service Commission allows fully automatic clauses in the rate schedules of utilities under its jurisdiction.[35]

An example of a fuel adjustment clause, as approved by the Mississippi Public Service Commission in January, 1971, for residential service by Mississippi Power Company, is included as appendix I to this comment. Under that tariff, the commission established the base cost of fuel for the company's generated power at 24.50 cents per million Btu's.[36] Increases in fuel costs over this base cost are calculated by the

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nies, who feared that billing costs would outweigh revenues in residential schedules. He reports that, by 1958, only 17 states had authorized FAC's in residential schedules. Trigg, *supra* note 2, at 974, 976.

[28] Memorandum of Douglas Brumfield, Chief Accountant, Mississippi Public Service Commission, to Public Service Commissioners, April 12, 1973, on file with the *Mississippi Law Journal*.

[29] *See* ECONOMICS DIVISION, CONGRESSIONAL RESEARCH SERVICE, *supra* note 19, at Table I.

[30] D. JONES & S. DOVELL, *supra* note 7, at Table VII. The West Virginia legislature recently prohibited FAC increases unless expressly approved by the Public Service Commission after a hearing in each instance. PUB. UTIL. FORT., May 8, 1975, at 46.

[31] Jones & Dovell, *Fuel Adjustment Clause Actions in the Electric and Gas Utility Industries, 1973-74: A State-By-State Statistical Analysis, printed in* 121 CONG. REC. S4963 n.1 (daily ed. Mar. 24, 1975). South Dakota, as of July 1, 1975, extended regulatory jurisdiction to electric utility rates. PUB. UTIL. FORT., May 8, 1975, at 46.

[32] *See* ARIZ. REV. STAT. ANN. § 40-368 (West 1956); ARK. STAT. ANN. § 73-219 (1957); CALIF. PUB. UTIL. CODE § 457 (West 1956); MD. ANN. CODE art. 78, § 54 (1975); N.H. REV. STAT. ANN. ch. 378, art. 11 (1966); N.Y. PUB. SERV. LAW § 65 (McKinney 1955); PA. STAT. ANN. tit. 66, § 1147 (Purdon's 1959); WIS. STAT. ANN. § 196.11 (West 1957).

[33] D. JONES & S. DOVELL, *supra* note 7, at 4.

[34] *Id.*

[35] FEDERAL POWER COMMISSION, NATIONAL ELECTRIC RATE BOOK, MISSISSIPPI (Oct. 1973).

[36] A fuel adjustment clause was first put into the company's rate schedules in 1954,

company on a monthly basis. This data is then reviewed by the commission,[37] and the increase is passed on to the company's customers in the second month following the month of determination.[38] No rate hearing is required. There is also a "purchased power" provision in the tariff, which permits a full pass-through of the fuel cost component of lower cost "pool" energy available and purchased by the company from an interstate power pool.[39]

In August, 1974, a new FAC was approved for Mississippi Power Company which not only permits the inclusion of the total energy cost of all energy purchases but also permits all revenue derived from energy sold to other utilities to be used as a credit against energy generated and purchased by the company.[40]

The Federal Power Commission, in November, 1974, amended its regulations to allow FAC's in tariff schedules for power sales under its jurisdiction.[41] These regulations now contain a simple, straightforward formula for computing the adjustment factor to be applied to a base fuel cost. They provide:

> The fuel clause shall be of the form that provides for periodic adjust-

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with a base cost of 13.5 cents per million Btu. In June, 1964, the base cost was re-established at 20.0 cents where it remained until January, 1971. Memorandum of Douglas Brumfield, Chief Accountant, Mississippi Public Service Commission, to Public Service Commissioners, April 12, 1973, on file with the *Mississippi Law Journal*.

[37] *Id.* Mr. Brumfield writes that:

> [F]rom an accounting point of view, complete credence is placed upon the production departments because of the fact that such cost components as fuel consumption, kwh generated, MBtu, heat factor, etc., are by necessity measured by production charts and read by production personnel.

[38] *Id.* A different procedure was approved by the Mississippi Public Service Commission for the FAC in Mississippi Power & Light Company's rate schedules. The 2-month lag was eliminated. Presently the company is allowed to bill customers for estimated fuel costs in the current month, with a provision for correction of errors in the second succeeding month when the actual record of costs becomes available. Order of Mississippi Pub. Serv. Comm'n, In Re Mississippi Power & Light Co., July 12, 1974. Very similar to Mississippi Power and Light Company's clause was the one approved in December, 1974, by the Alabama Public Service Commission for the FAC in Alabama Power Company's rate schedule. PUB. UTIL. FORT., Jan. 30, 1975, at 42.

[39] Purchased energy comes from available system generation . . . at a lesser cost than any individual system is at the moment experiencing. This . . . "pool" energy . . . is transmitted by a system known as "Early Bird" which has the capability of determining instantaneously the most economically produced energy and the system or systems which can purchase . . . cheaper than it can generate . . . . [F]uel cost components of pool generation are calculated . . . without any verification.

Memorandum, *supra* note 6, at 2.

[40] Order of the Mississippi Pub. Serv. Comm'n, In Re Mississippi Power Co., August 12, 1974.

[41] 18 C.F.R. § 35.14 (1975).

ments per kWh of sales equal to the difference between the fuel cost per kWh of sales in the base period and in the current period:

Adjustment Factor = Fm/Sm-Fb/Sb

Where: "F" is the expense of fossil and nuclear fuel in the base (b) and current (m) periods; and "S" is the kWh sales in the base and current periods.[42]

The formula approved by the Mississippi Public Service Commission as part of a 1974 Mississippi Power and Light Company tariff, included as appendix II, is similar to the Federal Power Commission's in operation but is constructed in greater detail.

III. The Arguments Pro and Con

The Congressional Research Service observed in March, 1975, that:

> Probably the three biggest public policy issues in the electric power field today are the financing of new capital investment, the efficacy of declining block rate pricing in utility company tariff schedules, and the operations of so-called Automatic Adjustment Clauses—most particularly the Fuel Adjustment Clause (FAC).[43]

In the last 2 years, the controversy over fuel adjustment clauses has grown proportionately with the enormous cost increases that utilities have passed to utility customers through the FAC's. In several states the rate increases attributable to FAC's were especially dramatic: The 1974 figures, compared with 1973, showed increases of 1,400 percent in the District of Columbia, 900 percent in New York, 750 percent in Maine and Tennessee, more than 500 percent in Florida, Maryland, and Michigan, and more than 300 percent in California, Connecticut, Indiana, West Virginia, and Wisconsin.[44] Nationwide in 1974, rate increases attributable to FAC's totaled $6.5 billion, more than four times the 1973 total FAC increase of $1.5 billion.[45]

Opponents to the use of FAC's argue that they are incompatible with effective rate regulation. They point to several "disadvantages" of the automatic adjustment clauses: (1) FAC's give undue weight to a single-cost item; (2) they pass on increased costs without allowing for compensating economies; (3) they encourage waste and inefficiency by the company; (4) they weaken the company's incentive to search out whatever fuel bargains may be available; and (5) they may bias the selection of fuels or production methods in favor of those costs covered

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[42] *Id.*

[43] D. Jones & S. Dovell, *supra* note 7, at 1.

[44] *Id.* at VI.

[45] *Id.*

by the clauses.[46]

While it is arguable that the automatic pass-through of the full cost of a single expense item, like fuel, distorts the relation between rates and costs, under an FAC it is assumed that a one-to-one relation exists. Likewise, there may be compensating economies which are not credited against the increased fuel costs under an FAC. Such compensating economies may result from greater scale or improved technology, and fuel cost increases may be balanced by such operating economies as greater labor productivity.[47] One authority, writing in support of purchased gas adjustment clauses, discounts the danger of distortion for gas utilities but notes that, for electric companies, where the relation between fuel costs and rates is less direct, the distortion argument is more appropriate.[48] It is suggested that the danger can be minimized by requiring periodic subsequent cost-of-service filings and refunds of any pass-throughs that are determined to be excessive.[49]

When a company is allowed to pass through the total cost of fuel automatically, the incentive for efficiency in operation and for hard bargaining with fuel suppliers may be reduced, especially where the demand is relatively inelastic, as with electric power. *Consumer Reports* frames the inefficiency argument thus:

> Such pass-throughs merely provide an economic incentive for inefficiency: Utilities could purchase expensive fuel or allow other operating expenses to increase without worrying about hurting profits. In effect, they would be operating on a cost-plus basis that would insulate them from normal business risks. The consumer would bear all the risks of the utility business.[50]

One suggested solution is to allow only a partial pass-through, thus preserving an incentive for efficiency and hard bargaining. The Federal Power Commission disagreed when its amended FAC regulation was issued in 1974:

> Other comments suggest that utilities be permitted to recover only a portion of increased fuel costs in order to provide an incentive to bargain for lower cost fuel. It should be noted that to the extent that only a portion of charges in fuel costs are permitted to be reflected in rates, the purpose of the fuel clause (namely to pass on to customers

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[46] *Subcommittee of Staff Experts on Economics, National Association of Regulatory Utility Commissioners, Report on Automatic Adjustment Clauses*, 120 CONG. REC. E6529 (daily ed. Oct. 16, 1974).

[47] *Id.*

[48] Fowler, *Purchased Gas Adjustment Clauses: An Adjuster's Viewpoint*, 6 ST. MARY'S L.J. 567, 578 (1974).

[49] *Id.*

[50] CONSUMER REPORTS, Nov., 1974, at 839.

> the increases or decreases in the fuel costs actually incurred by the utility) is to that extent defeated. When fuel costs are rising the utility is disadvantaged by not being able to collect the full amount of the increase; when fuel costs are falling the customers are disadvantaged because the full amount of the reductions are not passed along, but are partly retained by the utility. In addition, the lag in collections for fuel expenses inherent in a typical fuel cost adjustment clause provides some incentive for companies to bargain for favorable prices during periods of rising fuel costs.[51]

The Mississippi Public Service Commission permits full cost recovery under its FAC's and in 1974 eliminated the 2-month lag between computation and customer billing on Mississippi Power Company tariffs, allowing the company to bill customers for "estimated fuel costs" of the current month, and including a refund provision for the amount that estimates were shown to have exceeded actual costs.[52] Clearly, this is a less effective efficiency incentive than the time lag under pre-1974 tariffs.

Another solution for the problem of inefficiency has been suggested: the establishment of Cost/Efficiency Adjustment Clauses (CEAC's).[53] Under the proposed CEAC, the utility would be allowed to recover the increased costs of inflation only in proportion to increased efficiency and productivity. While theoretically the CEAC may be an attractive alternative, the practical problems of constructing workable indices and gathering reliable data would be difficult to overcome. Such a CEAC was recently proposed in Illinois but was rejected by the Illinois Public Service Commission in May, 1975, in favor of case-by-case determinations.[54]

The argument that FAC's which cover only certain types of fuel (oil, for instance, but not coal) may encourage the company to utilize an inefficient energy source, in order to take advantage of the FAC, oversimplifies the issues, especially considering the high cost of conversion from one fuel to another. Nevertheless, the possibility that this form of FAC might encourage a utility to continue use of an inefficient energy source should be sufficient justification for periodic commission review of alternative energy sources and corresponding modifications of the FAC's, where indicated.

Opposition to FAC's also focuses on their abuses and potential abuses.[55] As the clauses have become more complex and the time be-

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[51] 18 C.F.R. § 35.14 (1975).

[52] *See* note 33 *supra*.

[53] PUB. UTIL. FORT., Aug. 15, 1974, at 19.

[54] PUB. UTIL. FORT., May 11, 1975, at 50.

[55] *See* Metcalf, *The Fuel Adjustment Clause*, 120 CONG. REC. E6529 (daily ed. Oct. 16, 1974); 120 CONG. REC. S22043-48 (daily ed. Dec. 18, 1974); CONSUMER REPORTS, *supra* note 50, at 837-39.

tween computation and actual pass-through shorter, the thoroughness of commission monitoring and verification of cost data has been reduced. This is especially serious with respect to purchased power provisions of some FAC's; it also increases the possibility that a company's data will include unauthorized fuel-related expenses (such as handling and storage costs) which will go undetected by the commission. *Consumer Reports* notes that "understaffed state commissions, flooded with requests for rate increases, can't check the details of these enormously complex transactions."[56] And, referring to purchased power accounting, a staff member of the Missouri Public Service Commission stated: "We can't go back to plants in Oklahoma and trace the cost of fuel. There are so many different plants, and they have so many different contracts. We take their word for the figures."[57] The same problem exists in Mississippi; purchased power cost figures are likewise accepted without verification.[58]

Another potential trouble spot is the less-than-arms-length fuel purchase:

> With the fuel-adjustment clause in operation, a utility can buy fuel from itself at an artificially high price and pass that price on to the consumer. In this way, though the utility may not increase its profit on the electricity it produces, it could make extra profit through a fuel subsidiary not subject to regulation.[59]

Companies are increasingly moving into the fuel supply area, in order to assure themselves of an adequate supply in times of fuel shortage. For example, Mississippi Power and Light Company has informed the Mississippi Public Service Commission that it purchases 90 percent of its total fuel requirements on a "no profit" basis from its subsidiary, System Fuels, Incorporated.[60] In a show cause order of May 1, 1975, the Mississippi Public Service Commission used the following language:

> The magnitude of such fuel purchases by Mississippi Power & Light Company from its own offspring, a company over which this Commission has no jurisdiction, unfurls the red flag of danger, calling into serious question the entire matter and arousing suspicions in the mind of the public. In the opinion of this Commission proof is required that such transactions have been carried out in good faith at arms length,

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[56] CONSUMER REPORTS, *supra* note 50, at 838.

[57] *Id.*

[58] *See* note 34 *supra*.

[59] CONSUMER REPORTS, *supra* note 50, at 837.

[60] See Memorandum of Douglas Brumfield, Chief Accountant, Mississippi Public Service Commission, to all Commissioners, dated July 29, 1974, for an audit report dealing with the Mississippi Power & Light Company and its fuel supply subsidiary, System Fuels Incorporated.

> and that they are clearly in the best interests of the Mississippi electric customer who must ultimately pay the high cost of boiler fuel because of the "fuel adjustment clause" in Respondent's tariff.[61]

The Federal Power Commission was concerned with this problem of company owned or controlled sources of fuel in 1974 when it modified the proposed regulations for FAC's in utility tariffs under its jurisdiction.

> The modification provided that when a utility purchases fuel from an owned or controlled source and the price is subject to the jurisdiction of a regulatory body, the cost of the fuel may be included in the fuel adjustment clause. However, if the price is not subject to the jurisdiction of a regulatory body, the utility must file the contract and amendments thereto with the Commission at the time the company's fuel clause or amendment to its fuel clause is filed. . . . We believe that this provision is necessary to insure the reasonableness of fuel costs from company-owned or controlled sources.[62]

The arguments in favor of FAC's point out that the traditional regulatory process is inadequate to keep pace with rising costs in periods of high inflation. Without some speedy method of passing through increased costs, the utilities will not be able to earn their "fair rate of return."[63] In 1974-1975 this "fair rate of return" became a critical issue for the utility companies. Consolidated Edison's announcement in April, 1974, that it would omit its quarterly dividend "pretty much destroyed what was left of the market for utility securities. . . . [T]he market for net issues of common stock disappeared almost entirely for a while."[64] During 1975, rate decisions have recognized the drastically increased utility financing costs, and commissions have become more generous in the rates of return they have allowed.[65] Without automatic adjustment clauses in their tariffs, however, the financial strain on many utility companies would have been incalculably worse. The Mississippi Public Service Commission, in a recent rate order, supported the fuel adjustment clause, stating that "it is impractical for the regulatory process to operate quickly enough to offset the dramatic changes in fuel costs and for this reason [the Commission] has permitted the Company to place a fuel cost adjustment clause in its rate schedules."[66]

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[61] Interim Order of Mississippi Pub. Serv. Comm'n, *In re* Mississippi Power & Light Co., May 1, 1975, at 5.

[62] 18 C.F.R. § 35.14 (1975).

[63] See part II *supra*.

[64] Loomis, *supra* note 3, at 184.

[65] *Id.* at 187.

[66] Order of Mississippi Pub. Serv. Comm'n, *In re* Mississippi Power & Light Co., July 12, 1974, at 5.

Conclusion

One authority has characterized the controversy over FAC's in this way:

> The current popular outcry against [FAC's] is attributable to their working exactly as designed—to protect the financial viability of power companies while charging consumers reasonable (in relation to utilities' incurred costs) prices for the power they use.[67]

Even one harsh critic of adjustment clauses, writing in 1947, admitted that they served a useful purpose in times of extraordinary inflation:

> A quarter of a century ago, during the first World War, the cost of coal had been fluctuating sharply and rapidly. Utilities with which this item of expense was critical, required prompt relief to avoid financial disaster.[68]

Clearly, today, the FAC fulfills a necessary role in the regulatory process, just as it did in 1917.

The potential for abuse is the greatest disadvantage of the FAC; therefore, it is essential that the regulatory commissions take steps to ensure against such abuse. It has been suggested that the commissions should require careful documentation of the companies' search for fuel supplies and their negotiations with suppliers; that they monitor thermal efficiency and maintenance practices; that they compare fuel costs reported with others in the area; that they maintain a 2-month lag between computation and actual pass-through, in order to keep some financial pressure on the companies; and that they conduct random spot checks and audits of fuel costs and practices.[69] So long as the FAC is not abused by the company, and so long as regulatory commissions diligently guard against abuse, the automatic FAC will be an effective part of the regulatory process.

Sidney Jerald Martin

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[67] Schiffel, *Electric Utility Regulation: An Overview of Fuel Adjustment Clauses*, Pub. Util. Fort., June 19, 1975, at 27.

[68] Hirsch, *Fuel Clause et. al. Versus Effective Rate Regulations*, *reprinted in* 120 Cong. Rec. S12508 (daily ed. July 16, 1974).

[69] Schiffel, *supra* note 67, at 29.

APPENDIX I

FPC, National Electric Rate Book, Mississippi, Oct. 1973

(1) Residential Service

Desig: R-4 July 1, 1972

Fuel Adjustment (Schedule FA 2): To the above charges for electric service under this rate schedule there shall be added or subtracted an amount per kwh used by the customer determined as follows:

1. The excess or reduced fuel costs associated with generation in the utility's plants shall be taken as the total kwh generated multiplied by 0.028 mills for each full 0.25¢ that the average cost of fuel in such plants exceeds or is less than 24.50¢ per million Btu for current month.

2. The excess or reduced fuel costs associated with energy purchased by the utility shall be taken as the amount by which the fuel cost component in such purchased energy exceeds or is less than 2.900 mills per kwh purchased for same month.

3. The algebraic sum of the above excess or reduced fuel costs in dollars will be divided by the monthly kwh sales, for the same accounting period as for the fuel cost determination, taken to the nearest 0.001 mill.

4. The amount so obtained shall be applied to energy consumption during the second billing month following the month of cost determination.

APPENDIX II

Mississippi Power & Light Company	Mississippi Public Service Commission
Availability: At any point on Company's System.	P.S.C. Schedule No. 1-27.2
Date Filed: January 17, 1974.	Original Page No. 27.2,
Date to be Effective: February 17, 1974.	Date: February 17, 1974.
	Schedule Consists of: One Sheet.

KIND OF SERVICE: ELECTRIC: FUEL ADJUSTMENT RIDER

RIDER SCHEDULE FA.1

APPLICATION

This rider will be applied in conjunction with currently applicable rates on file with Mississippi Public Service Commission.

BILLING

As adjustment "First" under Company's rate schedules there shall be added to or subtracted from the net billing an amount equal to the KWH used multiplied by an adjustment computed in accordance with the following formula:

$$FA = \frac{(C_f - \$7.00E_f) + (C_p - \$6.40E_p)}{(E_f + E_p)} \quad \frac{(1{,}000)}{} \quad \frac{I}{S}$$

Where:

FA = Fuel adjustment per kWh to be applied to energy billed in the current month.

C_f = Cost to the Company of fossil fuel used during the month for the production of electric energy in the Company's generating stations for distribution and sale in its operating area.

E_f = Net mWh generated from fossil fuel during the month in Company's generating stations for distribution and sale in its operating area. [$7.00 is the base cost of fuel under the bonded rates.]

C_p = Cost to the Company of electric energy purchased during the month for distribution and sale in its operating area.

E_p = Net mWh purchased by the Company during the month for distribution and sale in its operating area.
[$6.40 represents the cost of the purchased power fuel component, as an example.]

I = Net mWh input into Company's system for the supply of energy in its operating area for the prior calendar year.

S = MwH sales by Company in its operating area in the prior calendar year. However, billing for January cycle will be based on I and S values for the calendar year ending 12 months earlier. [The figure 1000 reduces MwH to Kwh.]

The adjustment for any month will be made on the basis of the projected production, purchases and costs for the month. Actual production, purchases and costs as subsequently accounted for will be used to determine any overage or deficiency in the adjustment applied in the month. Such overage or deficiency will be taken into account by subtracting or adding an appropriate amount to the adjustment as projected for the second succeeding month.

COSTS AND ELECTRIC ENERGY TO BE INCLUDED

Company is the sole supplier of electric energy to retail customers and to certain municipal and cooperative electric distributors in Western Mississippi, said area being referred to as Company's "operating area." Company has interconnections with other electric utilities operating outside of Western Mississippi with whom it has mutually supporting supply obligations.

In accounting for generation and purchases of electric energy for the purposes of this rider Company will insofar as is practicable allocate the lowest cost electric energy available to it on an hourly basis to the supply of energy for distribution in its operating area and include such energy and associated costs in its fuel adjustment calculations. The remaining energy and associated costs will normally be allocated to deliveries made to interconnected utilities and excluded from the fuel adjustment calculation; however, where Company has for the purpose of obtaining an energy supply for the customers in its operating area agreed to share in a take or pay for fuel agreement of another utility the Company's pro rata part of the costs and the associated energy will be included in the fuel calculation.

Normally demand charges or capacity costs will be excluded from the fuel adjustment calculations for energy purchased for distribution in Company's operating area, but if such a purchase is made because of a fuel problem the energy and the total charges for such purchase will be included in the fuel adjustment calculation.

PROBATE OF LOST WILLS IN MISSISSIPPI

Few problems are more difficult than those confronting attorneys, parties, and courts arising from the different factors which affect probating a lost will. This comment hopes to facilitate the practical application of the probate procedure by examining the legal issues involved in the probate of a lost will in Mississippi. A "lost will" is one which the testator did not revoke, yet the proponents of the will are unable to present it for admission to probate.[1] Furthermore, a will could be considered lost whenever something other than the original document is offered for probate.[2] The term "lost will" is thus broad enough to encompass wills that have been entirely or partially destroyed under circumstances that do not constitute a revocation and wills which may be in existence but which cannot be procured in order to be admitted to probate.[3] A will may have been mislaid, lost, or destroyed through negligence by the testator without any intention of revoking it;[4] or a third party, such as an excluded heir, may have fraudulently destroyed the will;[5] or the will may have become lost because of events beyond the control of the testator, such as an earthquake[6] or theft.[7]

Probate procedure for a lost will is essentially the same as one for any will properly presented to the probate court.[8] In Mississippi a will, whether lost or not, may be probated in common form or in solemn form.[9] A will is probated in common form by persuading all the interested parties to join in the petition for probate.[10] The petition is then presented to the clerk of the court[11] of proper jurisdiction[12] and venue.[13] Probating a will in solemn form employs the same basic procedure except for one significant variation—all interested persons are made parties to the probate through service of process.[14] If all interested parties

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[1] 3 W. Bowe & D. Parker, Page on Wills § 27.1 (rev. 1961) [hereinafter cited as Page on Wills].

[2] Walsh, *Lost Wills and the Register of Wills*, 111 U. Pa. L. Rev. 450, 451 (1963).

[3] 3 Page on Wills § 27.1 (rev. 1961); *see* Denson v. Denson, 203 Miss. 146, 33 So. 2d 311 (1948) (will based on oral contract held irrevocable by equity court).

[4] Adams v. Davis, 233 Miss. 228, 102 So. 2d 190 (1958); Veazey v. Turnipseed, 219 Miss. 559, 69 So. 2d 379 (1954).

[5] Berry v. Lowrey, 119 Miss. 582, 81 So. 273 (1919); Vining v. Hall, 40 Miss. 83 (1866).

[6] *In re* Patterson's Estate, 155 Cal. 626, 102 P. 941 (1909).

[7] Charles v. Charles, 313 Mo. 256, 281 S.W. 417 (1926).

[8] *See* Miss. Code Ann. §§ 91-7-1 to -31 (1972).

[9] Simes, *The Function of Will Contests*, 44 Mich. L. Rev. 501, 516-17 (1946); *see* Miss. Code Ann. §§ 91-7-19 to -29 (1972).

[10] Minniece, *The Probate of the Will*, 24 Miss. L.J. 492, 493 (1953).

[11] Miss. Code Ann. § 9-5-141 (Supp. 1975).

[12] *Id.* § 9-5-83 (1972).

[13] *Id.* § 91-7-1.

[14] Minniece, *supra* note 10, at 493.

are not served with process, they have the right to contest the will at any time within 2 years, or in case of a minority or disability, 2 years after their disability has been removed.[15]

In order to prove the will an interested party[16] must present the will to the court or show that it had existed at one time and that it was executed properly. Proper execution requires the testator or testatrix, being 18 years of age and of a sound and disposing mind, to sign the will.[17] If the will is not wholly written and subscribed by the testator or testatrix, at least two witnesses must attest to its validity.[18] At least one of the subscribing witnesses, if alive and competent, must testify to prove valid execution of the will.[19] If not, the will may still be established by proving the handwriting of the testator or the subscribing witnesses.[20] Generally, once a will has been probated in common form and no one appears to contest it within 2 years, the probate shall be final and forever binding, except as to those under a disability.[21]

Since the procedure for probating a lost will is essentially the same as with any other will, these procedural steps should not be difficult. Various evidentiary problems, however, are inherent in the probate of a lost will. One of the principal problems is that within the probate procedure lies an abundant capacity for fraud. Thus, the judicial reluctance to probate a will not produced for probate is easily understandable. The will may never have existed or may never have been properly executed. If an exact copy is not offered, then doubts as to the contents become important. The testator may have destroyed the will during his lifetime with full intention to revoke it, and it is now being offered for probate by one of the beneficiaries of the revoked will. The courts and legislatures are aware of these problems and have erected formidable elements of proof which must be satisfied when establishing a lost or destroyed will.[22] This comment will emphasize the procedure and difficulties presented in meeting the basic elements of proof required by the Mississippi judiciary in the probate of a lost will. In addition, existing state

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[15] MISS. CODE ANN. § 91-7-23 (1972).

[16] Hoskins v. Holmes County Community Hosp., 135 Miss. 89, 101, 99 So. 570, 573 (1924) (interested party defined as one who has a pecuniary interest in the subject of the contest; heir at law who would take property of deceased in absence of valid will is always an interested party).

[17] MISS. CODE ANN. § 91-5-1 (Supp. 1975).

[18] *Id.*

[19] *Id.* § 91-7-7 (1972).

[20] *Id.*

[21] *Id.* § 91-7-23; *accord*, Perry v. Aldrich, 251 Miss. 429, 436, 169 So. 2d 786, 789 (1964).

[22] *See* T. ATKINSON, LAW OF WILLS § 97 (2d ed. 1953); Evans, *The Probate of Lost Wills*, 24 NEB. L. REV. 283, 284 (1945).

statutory provisions in other jurisdictions and their impact upon the probate of a lost will will be briefly discussed.

I. Admission of a Lost Will to Probate

The Mississippi Supreme Court established in *Berry v. Lowrey*[23] that a proponent of a lost will has a right to its probate.[24] Notwithstanding that an heir is an interested party under the will, in *Berry*, the court held that the heir was not estopped from subsequently bringing an action to probate her uncle's lost will by which he had given her his property. The girl's father had allegedly destroyed the will and taken the uncle's property under the Mississippi laws of descent and distribution as his only heir at law. The court further stated that the niece had a right to probate the will, even though she had taken under her father's will which did not devise to her the land inherited from her uncle.[25]

Proceedings for the admission of a lost will to probate are generally begun by a petition to the proper court.[26] The petition must set out all the facts which are necessary to entitle the will to be admitted to probate as a lost will.[27] The proponents have the burden of proving its validity throughout the entire contest.[28] Three basic elements of proof have to be established before the will may be probated in Mississippi: (1) proof of the existence and proper execution of the will, (2) evidence of its loss or destruction, and (3) proof of its contents.[29] Under the Uniform Probate Code, if the petition for probate is not accompanied by the original will or a valid copy, the petition must state the contents of the will and show that it cannot be produced.[30] Each element must be developed fully and established by the clearest, most convincing, and satisfactory proof.[31]

II. Proof of Execution

The execution of a lost will must be proved in basically the same

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[23] 119 Miss. 582, 81 So. 273 (1919).

[24] *Id.* at 588, 81 So. at 275.

[25] *Id.* at 587, 81 So. at 274-75.

[26] 3 Page on Wills § 27.11 (rev. 1961).

[27] *Id.*

[28] Veazey v. Turnipseed, 219 Miss. 559, 565, 69 So. 2d 379, 382 (1954); Warren v. Sidney's Estate, 183 Miss. 669, 675, 184 So. 806, 807 (1938).

[29] Warren v. Sidney's Estate, 183 Miss. 669, 675-76, 184 So. 806, 807 (1938).

[30] Uniform Probate Code § 3-402 (b). This section specifically provides:

> If the original will is neither in the possession of the court nor accompanies the petition and no authenticated copy of a will probated in another jurisdiction accompanies the petition, the petition must also state the contents of the will, and indicate that it is lost, destroyed, or otherwise unavailable.

[31] Vining v. Hall, 40 Miss. 83, 103 (1886).

manner as an original.[32] Despite the presence of the other requisite elements, probate will be denied where proof of the will's execution is inadequate.[33] Mississippi requires, by statute, proof of execution through the testimony of at least one of the subscribing witnesses; however, if no such witness can be produced, proof of the testator's and subscribing witnesses' handwriting can establish proper execution.[34] In *Warren v. Sidney's Estate*,[35] a case involving a lost will, the Mississippi Supreme Court held that the testimony of one subscribing witness was sufficient to establish the execution of the will even though the other subscribing witness did not remember signing it.[36] The court stated:

> It is not the policy of the law to permit the defeat of the probate of a will because of the failure of the memory of an attesting witness. The right of a testator to make a will and devise his property as he pleases should not . . . be conditioned upon any such fact that might so easily thwart and evade all of the intentions and purposes of the testator . . . .[37]

The court further found that the resolution of conflicting testimony given by two subscribing witnesses is a question of fact for the jury.[38]

If either or both of the attesting witnesses are incapable of testifying that the lost will has been executed or they deny its execution altogether, secondary evidence establishing execution may be introduced by the proponents.[39] In *Estate of Willis v. Willis*,[40] both witnesses to the lost will of the testator had died. Proponents attempted to use as secondary evidence the testimony of two persons who had seen the will and recognized the signature of the testator. The court held, however, that the evidence was insufficient to establish the execution of the will since they could not verify the signatures of the attesting witnesses.[41] Although the testimony of only one living witness is sufficient to establish a will's

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[32] T. ATKINSON, *supra* note 22, § 97, at 509.

[33] Walsh, *supra* note 2, at 453; *see* Lewis v. Byars, 109 So. 794 (Miss. 1926) (proof by subscribing witness held insufficient to show due execution).

[34] MISS. CODE ANN. § 91-7-7 (1972) which specifically provides:

> The due execution of the will, whether heretofore or hereafter executed, must be proved by at least one of the subscribing witnesses, if alive and competent to testify. If none of the subscribing witnesses can be produced to prove the execution of the will, it may be established by proving the handwriting of a testator and of the subscribing witnesses to the will, or some of them.

[35] 183 Miss. 669, 184 So. 806 (1938).

[36] *Id.* at 678, 184 So. at 808.

[37] *Id.* at 678-79, 184 So. at 809.

[38] *Id.* at 680, 184 So. at 809.

[39] Warren v. Sidney's Estate, 183 Miss. 669, 680, 184 So. 806, 809 (1938); Ward v. Ward, 124 Miss. 697, 706, 87 So. 153, 154 (1920).

[40] 207 So. 2d 348 (Miss. 1968).

[41] *Id.* at 349.

proper execution, proof of the signatures of the two attesting witnesses is required to prove due execution where the witnesses to a will are deceased.[42]

Since there is no requirement that two witnesses attest a holographic will,[43] secondary evidence must be used to prove the execution of a lost holographic will. In *Veazey v. Turnipseed*[44] the court held that the testimony of a witness who had read the holographic will at the request of the testatrix and recognized it as being wholly in the testatrix's handwriting and signed by her was sufficient to establish the existence and proper execution of the will.[45]

Declarations of the testator alone are insufficient to establish the existence of a lost will.[46] If substantiated by other competent evidence, however, the declarations may be properly used to establish its execution or contents.[47] The court in *Warren* allowed testimony which revealed statements made by the testatrix on her deathbed that she had made a will to corroborate similar testimony of one of the attesting witnesses.[48]

III. Proof of the Contents

After the execution of a purportedly lost will has been established, the contents of the document must be proved. This proof can be elicited only by secondary evidence and usually is accomplished by the testimony of persons who have seen the will.[49] Where no statute exists, most courts hold that the testimony of a single witness as to the contents is sufficient to permit probate provided such testimony furnishes adequate support.[50] In Mississippi the contents of a lost will must be shown "by the clearest, most conclusive, and satisfactory proof."[51] In *Veazey v. Turnipseed*[52] the Mississippi Supreme Court allowed the testimony of a single witness coupled with other corroborating evidence to show clearly and conclusively that the testatrix had left her entire estate to the proponents of the lost will.[53] The contents may also be shown by the

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[42] *Id.*; *see* Miss. Code Ann. § 91-7-7 (1972).

[43] Miss. Code Ann. § 91-5-1 (Supp. 1975).

[44] 219 Miss. 559, 69 So. 2d 379 (1954).

[45] *Id.* at 565, 69 So. 2d at 382.

[46] *See* Warren v. Sidney's Estate, 183 Miss. 669, 680, 184 So. 806, 809 (1938); *cf.* Moore v. Parkes, 122 Miss. 301, 341, 84 So. 230, 240 (1920).

[47] Warren v. Sidney's Estate, 183 Miss. 669, 681, 184 So. 806, 809-10 (1938).

[48] *Id.*, 184 So. at 810.

[49] T. Atkinson, *supra* note 22, § 97, at 510.

[50] *Id.*

[51] Vining v. Hall, 40 Miss. 83, 103 (1866).

[52] 219 Miss. 559, 69 So. 2d 379 (1954).

[53] *Id.* at 565-66, 69 So. 2d at 382.

production of a copy of the will and proof that it is accurate.[54] A draft of the will or a memorandum of the provisions made by the testator may also be used to establish its contents.[55]

The evidence offered to prove the contents of the will must be more than a "dim recollection" of the will's provisions.[56] In *Lewis v. Byars*[57] two subscribing witnesses were called to prove the contents of a lost will. One of the witnesses was asked:

> How did you know it was a will?
> A: I read it.
> What were the contents of it?
> A: The contents started off like a man usually makes a will, and it mentioned the Gray children; that was as far as I read.[58]

The other witness was not even able to swear that the testator signed the will. The Mississippi Supreme Court, in a very brief opinion, held that such vague, general testimony is insufficient to prove the contents of a will.[59]

Where there is other evidence with regard to the contents of a lost will, declarations of the testator may only be received as corroborative proof of its contents and may not be used solely to prove the provisions of the will.[60] In *Sanders v. Sanders*,[61] however, the Mississippi Supreme Court held that declarations of the testator made at or about the time of the execution of the alleged will are a part of the res gestae and are admissible as primary evidence.[62]

Historically, if the entire will could not be proved, the ecclesiastical court would not probate the parts that could be proved.[63] Today, the majority of the courts have departed from this rule and permit the partial probate of a will as to those provisions which are sufficiently proved when they are separable from the remainder and independently enforceable.[64]

The dead man statute in Mississippi has provided problems for the

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[54] *See* Warren v. Sidney's Estate, 183 Miss. 669, 184 So. 806 (1938); Wilbourn v. Shell, 59 Miss. 205 (1881).

[55] *See* Berry v. Lowrey, 119 Miss. 582, 81 So. 273 (1919).

[56] T. ATKINSON, *supra* note 22, § 97, at 510-11.

[57] 109 So. 794 (Miss. 1926).

[58] *Id.* at 794.

[59] *Id.*

[60] Warren v. Sidney's Estate, 183 Miss. 669, 681, 184 So. 806, 809-10 (1938); Lewis v. Byars, 109 So. 794 (Miss. 1926); Moore v. Parkes, 122 Miss. 301, 341, 84 So. 230, 240 (1920).

[61] 126 Miss. 610, 89 So. 261 (1921).

[62] *Id.* at 625, 89 So. at 263.

[63] 3 PAGE ON WILLS § 27.6 (rev. 1961).

[64] 95 C.J.S. *Wills* § 337 (1957).

proponents of lost wills since a person cannot testify as a witness to establish his own claim or defense against the estate of a deceased person.[65] In *Veazey v. Turnipseed*[66] the court applied the dead man statute in a suit to establish a lost will by holding that the testimony of the defendant was incompetent because it would have raised the presumption that the lost will had been revoked.[67] However, the court allowed introduction of the testimony of the testatrix's niece about the existence of the will on the ground that the witness was testifying against her own interest for if the testatrix had died intestate, the niece would have inherited a small interest in her estate.[68]

Proving the exact words of the testator is not necessary in establishing the contents of the will; only the substance of the will must be shown. Otherwise, it would be impossible to probate a lost will unless a copy could be produced.[69]

IV. Evidence of Loss or Destruction

The proponent of a lost will must explain why the original is not offered for probate. If a will is last known to have been in the possession of the testator and is not found after a diligent search,[70] it is presumed to have been destroyed by him *animo revocandi*.[71] The presumption is also applicable where the testator had access to the will before he died since he is not required to have actual possession.[72] This presumption is not conclusive, however, and may be rebutted by direct proof that the will was destroyed by another, or it may be rebutted through circumstantial evidence that the will was not revoked.[73]

The burden of proof is on the proponent of a lost will to rebut the presumption of revocation by clear and convincing evidence.[74] If the proponent does not clearly rebut the presumption, probate must be denied. In *James v. Barber*[75] the court held:

> [T]he proof clearly shows that the will was in her [the testatrix's]

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[65] Miss. Code Ann. § 13-1-7 (1972).

[66] 219 Miss. 559, 69 So. 2d 379 (1954).

[67] *Id.* at 568, 69 So. 2d at 383.

[68] *Id.* at 566-68, 69 So. 2d at 382-83.

[69] T. Atkinson, *supra* note 22, § 97, at 511-12.

[70] Watkins v. Watkins, 142 Miss. 210, 234, 106 So. 753, 757 (1926).

[71] Estate of Willis v. Willis, 207 So. 2d 348, 349 (Miss. 1968); James v. Barber, 244 Miss. 234, 248, 142 So. 2d 21, 27 (1962); Adams v. Davis, 233 Miss. 228, 237, 102 So. 2d 190, 193 (1958); Veazey v. Turnipseed, 219 Miss. 559, 569, 69 So. 2d 379, 383 (1954); Wilbourn v. Shell, 59 Miss. 205, 208 (1881).

[72] 3 Page on Wills § 29.139 (rev. 1974-1975).

[73] *See* Phinizee v. Alexander, 210 Miss. 169, 199, 49 So. 2d 250, 252 (1950).

[74] James v. Barber, 244 Miss. 234, 248, 142 So. 2d 21, 27 (1962).

[75] 244 Miss. 234, 142 So. 2d 21 (1962).

> possession when last seen and could not be found after her death; and under these circumstances there is a strong presumption, in the absence of other evidence, that the will was revoked by destruction by the testator [sic] animo revocandi, and this presumption stands in the place of positive proof.[76]

The *animo revocandi* presumption is not altered by the fact that the will was executed in duplicate and one of the executed copies was in the possession of another.[77] In *Adams v. Davis*[78] the will in question was prepared and executed in triplicate. Although the original was lost, the copies were safely placed in the possession of third parties. The Mississippi Supreme Court stated that the *animo revocandi* presumption applied, but subsequently held that it had been sufficiently rebutted by the overwhelming weight of the evidence.[79] No such presumption arises, however, where the will cannot be found if the original had been in the custody of someone other than the testator.[80]

Determining what evidence is admissible to rebut the presumption of revocation has proved to be a difficult question for the courts. Nonrevocation of a lost will is most commonly sought to be proved by evidence of the testator's declarations that the will was in existence and unrevoked. In most jurisdictions this type of evidence is admissible.[81] The Mississippi Supreme Court held in *Phinizee v. Alexander*[82] that a witness' testimony that the testator had told her about a week or two before he died that he had a will is sufficient to rebut the presumption of revocation.[83]

Evidence that the testator was on friendly relations with the beneficiaries of the lost will or that he was unfriendly toward those who would benefit by the revocation of the will has been admitted in numerous cases.[84] In *Adams* the Mississsippi Supreme Court stated:

> It is difficult to lay down any general rule as to the nature of the evidence which is required to rebut the presumption of destruction: It depends to a considerable extent on the testator's property and his relations towards his family. Where the will makes a careful and detailed disposition of the testator's property, and nothing happens to make it probable that he wishes to revoke it, the presumption . . . may be rebutted by slight evidence, especially if it is shown that the access

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[76] *Id.* at 248, 142 So. 2d at 27.
[77] 57 AM. JUR. *Wills* § 553 (1948).
[78] 233 Miss. 228, 102 So. 2d 190 (1958).
[79] *Id.* at 240, 102 So. 2d at 195.
[80] T. ATKINSON, *supra* note 22, § 97, at 510.
[81] *See* Annot., 3 A.L.R.2d 949 (1949).
[82] 210 Miss. 196, 49 So. 2d 250 (1950).
[83] *Id.* at 200, 49 So. 2d at 252.
[84] *See* Annot., 3 A.L.R.2d 949 (1949).

> to the box . . . where the will was kept, could be obtained by persons whose interest it is to defeat the will. In fact, it may almost be said that in such a case, the presumption is the other way, namely, that the testator did not intend to die intestate.[85]

The will in *Adams* had been kept under the bed of the testatrix in a black handbag. The bag was accessible to a friend of the testatrix's husband who was interested in destroying the will so that the testatrix's husband could inherit the entire estate. The court held that proof of access to the will or opportunity to destroy it by one having an adverse interest is admissible to show that the testatrix did not intend to revoke the will.[86]

The presumption may also be overcome by proof that the testator was insane at the probable time of the disappearance of the will. In *Watkins v. Watkins*[87] the evidence clearly disclosed that the testator had been of sound and disposing mind at the time of execution and that the will had not been revoked when the first signs of mental incapacity were noticed.[88] The court held that the mental capacity required to revoke a will is the same as that required to make one, and that the presumption of revocation could not apply to a person who did not possess the requisite capacity to revoke the will at the last time the will was shown to have been in existence.[89]

The court in *Tucker v. Whitehead*[90] laid the foundation for the admissibility of the foregoing types of evidence by stating:

> In such a case it is the part of wisdom to open the doors as wide as possible for the reception of every species of evidence at all calculated to advance the discovery of truth . . . . The evils which may spring from the introduction of parol proof . . . are less than those which must be wrought by its exclusion.[91]

The will may be the only vehicle by which a decedent ensures the disposition of his property according to his wishes. Where a will is lost or destroyed, the admission of parol proof may be essential to fulfill the testator's desires. This overriding consideration has prompted the Mississippi judiciary to adhere to the *Tucker* rationale despite the potential for fraud which accompanies the admission of parol evidence.

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[85] 233 Miss. 228, 238, 102 So. 2d 190, 194 (1958), *quoting* 1 T. JARMAN, A TREATISE ON WILLS 152-53 (6th ed. C. Sweet 1910) (footnotes omitted).

[86] *Id.* at 240, 102 So. 2d at 195.

[87] 142 Miss. 210, 106 So. 753 (1926).

[88] *Id.* at 227-28, 106 So. at 754-55.

[89] *Id.* at 234, 106 So. at 757.

[90] 59 Miss. 594 (1882).

[91] *Id.* at 606.

V. Statutory Provisions

Realizing that the circumstances of loss have made necessary special requirements of proof, about one-third of the states have enacted legislation governing the probate of a lost will.[92] These statutes seek to prevent the admission of spurious oral evidence; however, because of the problems encountered in obtaining adequate proof of a fraudulent destruction, the statutes may aid the deceitful avoidance of a valid will.[93] On this basis, this type of legislation has been characterized as misguided statutes that can lead to a lost will's annulment.[94]

Eight states have enacted statutes providing that the lost will must be proved "to have been in existence at the time of the death of the testator, or . . . fraudulently destroyed in his lifetime."[95] As a result, these jurisdictions have practically prevented the probate of an unrevoked will which is either lost while the testator was living or unable to be found upon his death.[96] Many courts have strained to avoid these results by interpreting the word "existence" to mean legal existence and not necessarily physical existence, even though this result is inconsistent with these statutes' apparent purpose.[97]

Statutes in 12 states require proof of the contents of the lost will by two credible or disinterested witnesses.[98] This provision has been heavily criticized on the premise that the issue of reliability cannot be

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[92] Model Probate Code, Appendix A § 77, at 299 (1946); *e.g.*, Ariz. Rev. Stat. Ann. § 14-3415 (1975); Ark. Stat. Ann. § 60-304 (1971); Cal. Prob. Code § 350 (West Supp. 1975); Colo. Rev. Stat. Ann. § 153-5-28 (1963); Ga. Code Ann. § 113-611 (1975); Kan. Stat. Ann. § 59-2228 (1963); Me. Rev. Stat. Ann. tit. 18, § 108 (1964); Ohio Rev. Code Ann. § 2107.26 (1968).

[93] Ferrier, *Wills: Statutory Restrictions on Probate of Lost Wills: Judicial Inroads on Restrictions*, 32 Calif. L. Rev. 221, 221-22 (1944).

[94] 9 J. Wigmore, Evidence § 2523, at 441 (3d ed. 1940).

[95] *See* Model Probate Code, *supra* note 92, at 300. The respective current statutory provisions are Ark. Stat. Ann. § 60-304 (1971); Cal. Prob. Code § 350 (West Supp. 1975); Nev. Rev. Stat. § 136.240 (1973); Okla. Stat. Ann. tit. 58, § 82 (1965); S.D. Compiled Laws Ann. § 30-6-27 (1967); Utah Code Ann. § 75-3-26 (1953); Wash. Rev. Code Ann. § 1.20.070 (1967); Wyo. Stat. Ann. § 2-73 (1957). Compare these provisions with Colo. Rev. Stat. Ann. § 153-5-28 (1963); Ga. Code Ann. § 113-611 (1975), and Me. Rev. Stat. Ann. tit. 18, § 108 (1964), which require proof that the will was in existence at the testator's death but do not address fraudulent destruction.

[96] 3 Page on Wills § 27.3 (rev. 1961).

[97] T. Atkinson, *supra* note 22, § 97, at 508.

[98] Model Probate Code, *supra* note 92, at 302. The respective current statutory provisions are Ark. Stat. Ann. § 60-304 (1971); Cal. Prob. Code § 350 (West Supp. 1975); Fla. Stat. Ann. § 733.207 (Special Supp. Pamphlet 1976); Me. Rev. Stat. Ann. tit. 18, § 108 (1964); Mich. Compiled Laws Ann. § 702.25 (1968); Nev. Rev. Stat. § 136.240 (1973); N.Y. Surr. Ct. Pro. Act § 1407 (McKinney 1967); Okla. Stat. Ann. tit. 58, § 82 (1965); S.D. Compiled Laws § 30-6-27 (1967); Utah Code Ann. § 75-3-26 (1953); Wash. Rev. Code Ann. § 11.20.070 (1967); Wyo. Stat. Ann. § 2-73 (1957).

resolved on a simple number basis.[99] A few of the states have attempted to mitigate the harshness of the provision by providing that a correct copy of the will may be used to replace one of the required witnesses.[100]

Special statutory provisions of this kind have not worked satisfactorily and have often prevented the probate of lost unrevoked wills.[101] Due to the rigidity of such formal restrictions and the practical impossibility of formulating any precise rules which would work justly in all cases,[102] most jurisdictions have chosen to follow common law practices which dictate general requirements of proof rather than enact specific statutory provisions. These states, including Mississippi, allow the probate of a lost will to be conducted essentially as if the will were not lost.[103]

Conclusion

The most satisfactory solution to the problem of lost wills is prevention. Attorneys should prepare duplicates of the will and inform prospective testators of the problems encountered when the original will is lost because of a testator's failure to preserve the will in a safe and accessible place. Possible solutions would be for the attorney to keep the original and give the client an unexecuted copy with a notation giving the location of the original; or the attorney could execute the copies producing duplicate originals. However, these solutions are not completely satisfactory because they would create a situation where complete revocation of the will by the testator would be difficult.

Many states have enacted statutes allowing the deposit of wills with the clerk of the probate court.[104] This procedure would ensure the protection of the will and it could be easily located after the testator's death. Mississippi has not enacted such a statute, but if people would merely follow the advice of their attorneys and preserve their wills in a secure place then the problems with lost wills would become practically nonexistent.

Ease of prevention, however, is of little consolation to the attorney forced to probate a lost will. Though faced with a difficult task, the attorney's problems are not insurmountable. A lost will may be admit-

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[99] 3 PAGE ON WILLS § 27.3 (rev. 1961).

[100] MODEL PROBATE CODE, *supra* note 92, at 302; *e.g.*, ARK. STAT. ANN. § 60-304 (1971); FLA. STAT. ANN. § 733.207 (Special Supp. Pamphlet 1976); N.Y. SURR. CT. PRO. ACT § 1407 (McKinney 1967).

[101] 3 PAGE ON WILLS § 27.2 (rev. 1961); *see* T. ATKINSON, *supra* note 22, § 97, at 508; MODEL PROBATE CODE, *supra* note 92, at 20.

[102] MODEL PROBATE CODE, *supra* note 92, at 20.

[103] 3 PAGE ON WILLS § 27.2 (rev. 1961).

[104] UNIFORM PROBATE CODE § 2-901, Comment; *e.g.*, ARK. STAT. ANN. § 60-415 (1971); MASS. GEN. LAWS ANN. ch. 191, § 10 (1975); MINN. STAT. ANN. § 525.22 (1975); N.Y. SURR. CT. PRO. ACT § 2507 (McKinney Supp. 1975).

ted to probate in Mississippi provded that there is clear and convincing evidence that the will was executed properly and there is clear proof of the contents. Further, the proponents of the lost will must overcome the common law presumption of *animo revocandi*. The procedure in Mississippi is flexible and will readily allow parol evidence to be used in establishing the lost will. Thus, a suitable framework exists within which an attorney may successfully fulfill the wishes of a testator whose will is lost.

Paul R. Lambert

RECENT DECISIONS

DEEDS OF TRUST—RESTRAINTS AGAINST ALIENATION—DUE-ON CLAUSE IS AN UNREASONABLE RESTRAINT ON ALIENATION ABSENT A SHOWING OF PROTECTION OF MORTGAGEE'S LEGITIMATE INTERESTS

Winifred S. Sanders brought an action in the Chancery Court of Lowndes County, Mississippi, to enjoin Dewitt T. Hicks from foreclosing a deed of trust.[1] The deed of trust was executed to secure a note, which bore no interest until after maturity, for the purchase price of property conveyed from the James M. Lees to the David C. Johnsons.[2] A provision in the deed of trust required the Lees' express written consent before sale or encumbrance of the property.[3] The Johnsons, after being denied such consent, conveyed the property to Mrs. Sanders subject to the indebtedness secured by the deed of trust.[4] Hicks, as trustee under the deed of trust, instituted foreclosure proceedings upon breach of the consent provision.[5] Sanders argued that the term in the deed of trust requiring consent before sale was an invalid restraint on alienation. Hicks argued that the restriction was a valid measure to protect the favorable interest arrangement accorded the Johnsons. No allegation of security impairment or default was made.[6] The chancery court denied Mrs. Sanders' request to enjoin the foreclosure proceedings. On appeal to the Mississippi Supreme Court, *held*, reversed and rendered. Restraints on alienation which condition the fee owner's right to sell or encumber the security upon the mortgagee's consent are not per se invalid

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[1] Named as defendants were Hicks, trustee under the deed of trust, and James M. Lee and wife, beneficiaries under the deed of trust.

The deed of trust, a three-party transaction, has essentially the same purpose as the conventional two-party mortgage. It differs in that the deed of trust is a conveyance to a third person to hold the property as security for payment of a debt. G. OSBORNE, MORTGAGES § 17 (2d ed. 1970). The terms mortgagor - mortgagee in the conventional two-party mortgage equate respectively to the grantor/borrower - beneficiary/lender terms of the deed of trust. 46 MISS. L.J. 169, 169 n.1 (1975). For the purposes of this note, these terms are used interchangeably.

[2] The terms of the note provided that the Johnsons would pay the Lees a purchase price of $30,000 for the conveyance of the Lees' service station. The $30,000 principal was to be paid in 179 monthly installments at an interest rate of 8 percent payable only upon maturity.

[3] The provision read: "The within property shall not be sold or encumbered without the express written consent of the within mortgagees or their assigns." Sanders v. Hicks, 317 So. 2d 61, 62-63 (Miss. 1975).

[4] Sanders took the conveyance by warranty deed with full knowledge that the Lees had denied consent.

[5] Sanders had made timely payments as required by the note and had violated no other terms of the deed of trust.

[6] Hicks' contention was based upon the allegation that the Johnsons could not pay interest and thus the provision was necessary to prevent someone of substantial means, such as Mrs. Sanders, from taking advantage of the contractual concession. The court summarily dismissed this contention as without merit and proceeded to view the restraint as "unrelated to any threat to the legitimate interests of the beneficiaries." 317 So. 2d at 63.

and will be enforced if reasonable under the circumstances of the particular case. When the restriction bears no relation to the mortgagee's legitimate interests, it is invalid as an unreasonable restraint on alienation. *Sanders v. Hicks*, 317 So. 2d 61 (Miss. 1975).

Prohibitions against restraints on alienation[7] originated in 13th century

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[7] The term "restraints on alienation" is often confusing. It can refer to two different types of restraints: (1) a restraint on the legal power of alienation or (2) a practical hindrance or suspension of alienability, as the effect of a zoning restriction. L. SIMES & A. SMITH, THE LAW OF FUTURE INTERESTS § 1111 (1956); *cf. In re* Anderson's Estate, 267 Minn. 264, 126 N.W.2d 250 (1964) (contrasting the rule as to direct restraints on alienation with suspension of the power of alienation). Restraint on the legal power of alienation is the meaning intended when used in this note. For an analysis of the differences between rules respecting restraints on alienation and suspension of the power of alienation, see Norvell, *The Power of Alienation: Direct Restraint v. Suspension*, 31 N.Y.U. L. REV. 894 (1956).

The restraints against alienation doctrine is fundamentally treated as the law of direct restraints, having no applicability to that class of restraints refered to as indirect restraints.

> An indirect restraint on alienation arises when an attempt is made to accomplish some purpose other than the restraint of alienability, but with the incidental result that the instrument, if valid, would restrain practical alienability.

L. SIMES & A. SMITH, *supra*, § 1112, at 5.

A direct restraint can be defined as:

> [A] provision in a deed, will, contract or other instrument which, by its express terms, or by implication of fact, purports to prohibit or penalize the exercise of the power of alienation.

Id. at 4-5. *See also* Note, *Direct Restraints on Alienation in Iowa*, 22 DRAKE L. REV. 342 (1973). Generally, direct restraints are subdivided into three categories which are formally defined as follows:

> A disabling restraint exists when property is conveyed or devised with a direction that it shall not be alienated. It is commonly designed to secure the continued enjoyment of the property to the conveyee, and, if valid, it would operate to remove the power of alienation as a characteristic of the estate granted.
>
> A forfeiture restraint, on the other hand, always involves the creation of a future interest. It arises when, by the terms of an instrument of transfer, the estate transferred will be subject to forfeiture on alienation or will be terminated. The provision constituting the restraint may be by either a common law condition subsequent, a special limitation, or an executory limitation.
>
> The term promissory restraint refers to a covenant in an instrument of conveyance, or to a contract, in which the promissor agrees not to alienate the property. To the extent that a contract not to alienate is enforceable in an action for damages, its validity is a matter of contract law, rather than of the law of property. But if the contract is of a sort which would be specifically enforceable, then its enforcement is concerned with the ownership of property.

L. SIMES & A. SMITH, *supra*, § 1131, at 17-18. These types of direct restraints are the basis for classification by the American Law Institute. 4 RESTATEMENT OF PROPERTY § 404 (1944) [hereinafter cited as RESTATEMENT].

The restraints on alienation doctrine should be distinguished from another device which also strives to insure freedom of alienation—the rule against perpetuities. The rule against perpetuities is a rule against remoteness and voids any limitation which postpones

England.[8] Decisions during this era show a tendency to expand the right of alienation incident to a fee simple estate.[9] Recognizing the desire to have feudal restrictions abolished, Parliament enacted the Statute *Quia Emptores*[10] in 1290, which established the rule of free alienability for all fee simple estates.[11] This right of alienation was subsequently regarded as an inherent and inseparable quality of a fee estate, such that conveyance of title included the right of free and unlimited alienation.[12] Although this common law rule[13] gained early ac-

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the vesting of an interest in property beyond lives in being plus 21 years. Goddard, *Non-Assignment Provisions in Land Contracts*, 31 MICH. L. REV. 1, 2-4 (1932). In contrast, the rule against restraints on alienation operates on interests already vested and generally voids provisions which prohibit or restrain alienation. In the context of restraints imposed by mortgage instruments, the restraints doctrine effects only interests which have previously vested and does not prevent or limit the vesting of any real property interest. *See generally* Manning, *The Development of Restraints on Alienation Since Gray*, 48 HARV. L. REV. 373, 381-93 (1935).

[8] Prior to the year 1290, valid restraints on alienation were prevalant. A tenant could not alienate or transfer his fee without consent from the lord under which he held. 3 W. HOLDSWORTH, HISTORY OF ENGLISH LAW 73-89 (1923). Likewise, in many cases a tenant could not alienate his land or transfer his fee without a license from his overlord or payment of a fine to a member of the clergy. C. MOYNIHAN, INTRODUCTION TO THE LAW OF REAL PROPERTY 21 (1962); 4 RESTATEMENT, *supra* note 7, Part III Introductory Note at 2373.

[9] W. FRATCHER, PERPETUITIES AND OTHER RESTRAINTS 2 (1955), *citing* FitzRoger v. Arundel, Bract. N.B. pl. 1054 (1225). "Although the acquiescence (attornment) of the tenant was necessary to the complete effectiveness of a transfer of land, that acquiescence could be compelled." *Id.*, *citing* Cambridge v. Risle, R.S.Y.B. 34-35 Edw. I, 314 (1306); Pesehale v. Fitz Aucher, Bract. N.B. pl. 533 (1231).

[10] 18 Edw. I, c. I (1290).

[11] The statute did, however, exclude tenants *in capite*, who were the tenants in chief holding immediately under the King. The King continued to exact fines for alienation from his tenants *in capite* until his right was abolished in 1660 by the Statute of Tenures. *See* W. FRATCHER, *supra* note 9, at 3-4.

[12] 61 AM. JUR. 2d *Perpetuities and Restraints on Alienation* § 94 (1972); *see* Manning, *supra* note 7, at 403. *See also* L. SIMES & A. SMITH, *supra* note 7, at § 1114; Comment, *Forfeiture Conditions on the Use of Land as Restraints on the Power of Alienation: A Question of Tolerance*, 25 BAYLOR L. REV. 135 (1973). For a general historical treatment of restraints, see 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 329-49 (2d ed. 1923).

[13] The rationale supporting the law against restraints on alienation is that restraints are repugnant to the nature of a fee. *See, e.g.*, Murray v. Green, 64 Cal. 363, 28 P. 118 (1883); Eastman Marble Co. v. Vermont Marble Co., 236 Mass. 138, 128 N.E. 177 (1920); *In re* Estate of Schilling, 102 Mich. 612, 61 N.W. 62 (1894); Dukes v. Crumpton, 233 Miss. 611, 103 So. 2d 385 (1958); 5 H. TIFFANY, REAL PROPERTY § 1343 (3d ed. 1939). This "repugnancy" theory postulates that every estate inland is composed of legal incidents of ownership which are not subject to derogation by the individual grantor, with alienability being the primary incident. L. SIMES & A. SMITH, *supra* note 7, § 1133; Manning, *supra* note 7, at 401. The repugnancy theory has been criticized, however, as a reversion to technical common law principles. *Id.* at 402-03. Although still followed in some jurisdictions, *see, e.g.*, CALIF. CIVIL CODE § 711 (West 1954), the better view finds the traditional repugnancy concept to have been superseded by the modern restraints on alienation doctrine. *See* L. SIMES & A. SMITH, *supra* note 7, § 1133; Manning, *supra* note 7, at 402-03.

ceptance in the United States,[11] all restraints on alienation were not wholly unacceptable. Various doctrines have developed which militate against the harsh results imposed by the common law rule.[15] Two basic approaches have been formulated: the "majority doctrine" and the "minority doctrine."[16] The traditional majority doctrine holds that all restraints on alienation are per se invalid, unless falling within certain recognized exceptions.[17] Under this approach,[18] these specific classes of exceptions have been strictly applied in each case.[19] While the recognized exceptions vary from court to court,[20] substantial agreement exists as to many.[21] Mississippi is generally in accord with the major-

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A more practical rationale supporting the rule is that restraints on alienation violate public policy. *See, e.g.*, Tracy v. Franklin, 31 Del. Ch. 477, 67 A.2d 56 (1949); Andrews v. Hall, 156 Neb. 817, 58 N.W.2d 201 (1953); O'Conner v. Thatford, 174 S.W. 680 (Tex. Civ. App. 1915). *But see* Northwest Real Estate Co. v. Serio, 156 Md. 229, 144 A. 245, 247-48 (1929) (dissenting opinion). *See also* J. GRAY, RESTRAINTS ON ALIENATION OF PROPERTY § 21 (1895). Under this view the law against restraints is justified as a useful device avoiding grave economic and social consequences such as the removal of property from commerce, the concentration of wealth, the limitations of property improvements, and the impeding of debt collection. *See* Baker v. Loves Park Sav. & Loan Ass'n , 21 Ill. App. 3d 42, 44, 314 N.E.2d 306, 308 (1974); A. CASHER & W. LEACH, CASES AND TEXT ON PROPERTY 1008 (2d ed. 1960). *See generally* Schnebly, *Restraints Upon Alienation of Legal Interests*, 44 YALE L.J. 1186 (1935).

[14] *See, e.g.*, Mandlebaum v. McDonell, 29 Mich. 78, 18 Am. R. 61 (1874); De Peyester v. Michael, 6 N.Y. 467, 57 Am. Dec. 470 (1852).

[15] A common theme running throughout the various doctrines must be noted. Recognition of the conflict of interests present when the restraints doctrine is found to rest on public policy grounds has led to a balancing of the beneficial characteristics of direct restraints with the policy of free alienability. This balancing process is seen in all justifications for restraints and is succinctly stated in the RESTATEMENT, *supra* note 7, § 410, comment *a* at 2429:

> Restraints on the alienation of property interests are justified if the objectives behind the imposition of the restraint are sufficiently important to outweigh the social evils which would flow from the enforcement of the restraint or if the interference with the power of alienation is so insignificant that no appreciable harm results from the enforcement of the restraint.

[16] *See* Volkmer, *The Application of the Restraints on Alienation Doctrine To Real Property Security Interests*, 58 IOWA L. REV. 747, 751-52 (1973).

[17] Bernhard, *The Minority Doctrine Concerning Direct Restraints on Alienation*, 57 MICH. L. REV. 1173, 1174-75 (1959). *See generally* Manning, *supra* note 7.

[18] Viewing this doctrine from the perspective of the RESTATEMENT, *supra* note 7, § 410, comment *d* at 2429, the paramount considerations of the decrease in alienability and the purpose of the restraint are reviewed only in establishing a particular class of exceptions and are not weighed in each case. L. SIMES & A. SMITH, *supra* note 7, § 1115.

[19] Bernhard, *supra* note 17, at 1174-75, 1177.

[20] *Compare* Furst v. Lacher, 149 Minn. 53, 182 N.W. 720 (1921), *with* Hankins v. Matthews, 221 Tenn. 190, 425 S.W.2d 608 (1968), *and In re* Budd's Estate, 11 Wis. 2d 248, 105 N.W.2d 358 (1960).

[21] One authority has summarized the major exceptions to the majority approach as follows:

1. The spendthrift trust and similar trust devices.
2. Restraints on the power to partition (if not to last too long a time).

ity doctrine and recognizes many of these exceptions.[22] Under the minority

3. Restraints (particularly forfeiture) on alienation to a small group of persons, where the group classification is not defined by race or other social characteristics.
4. Forfeiture restraints on a life or lesser estate.
5. Promissory (and sometimes forfeiture) restraints in the form of a right of preemption.
6. Restraints for the protection of the vendor in a land-sale contract.
7. Reasonable provisions in the articles of a business organization prohibiting transfer of shares.
8. Restraints applied to gifts to charities.

Bernhard, *supra* note 17, at 1175; *see generally* Manning, *supra* note 7, at 375-406.

Under the majority doctrine there is general agreement that most direct disabling restraints are void. *E.g.*, David v. Geyer, 151 Fla. 362, 9 So. 2d 727 (1942); Ogle v. Burmister, 146 Iowa 33, 124 N.W. 758 (1910); Dukes v. Crumpton, 233 Miss. 611, 103 So. 2d 385 (1958); Pavlikowski v. Ehrhardt, 192 Pa. Super. 373, 161 A.2d 652 (1960); Garner v. Becton, 187 Tenn. 34, 212 S.W.2d 890 (1948). *But see* Eade v. Browlee, 29 Ill. 2d 214, 193 N.E.2d 786 (1963) (appears to treat as valid a disabling restraint on alienation of the vendee's interest under a land contract); Ohio Soc'y for Crippled Children & Adults, Inc. v. McElroy, 175 Ohio 49, 191 N.E.2d 543 (1963) (perpetual disabling restraint on alienation of fee simple devised to a charitable corporation valid, subject to power of court to direct sale under *cy-press* doctrine). *See also* Braun v. Klug, 335 Mich. 691, 57 N.W.2d 299 (1953).

Certain forfeiture and promissory restraints may be valid, however, depending upon the type of restraint involved:

(1) *Restraints upon Life Estates*—Cotney v. Eason, 269 Ala. 354, 113 So. 2d 512 (1959); Luther v. Patman, 200 Ark. 853, 141 S.W.2d 42 (1940); Ricks v. Ridell, 200 Miss. 122, 26 So. 2d 782 (1946); *accord*, Mid-State Homes, Inc. v. Johnson, 218 Ga. 397, 128 S.E.2d 197 (1962) (provision for forfeiture of life estate if life tenant ceased to occupy the premises valid); *cf.* Security-First Nat'l Bank v. Rogers, 51 Cal. 2d 24, 330 P.2d 811 (1958). *See generally* Annot., 160 A.L.R. 639 (1946).

(2) *Restraints for a Limited Period of Time*—Fleming v. Blount, 202 Ark. 507, 151 S.W.2d 88 (1941); Furst v. Lacher, 149 Minn. 53, 182 N.W. 720 (1921); *accord*, Matlock v. Lock, 38 Ind. App. 281, 73 N.E. 171 (1905); Lynch v. Lynch, 161 S.C. 170, 159 S.E. 26 (1931). *Contra*, Hankins v. Matthews, 221 Tenn. 190, 425 S.W.2d 608 (1968) (10 years); *In re* Budd's Estate, 11 Wis. 2d 248, 105 N.W.2d 358 (1960) (5 years); *see* Page v. Page, 15 Utah 2d 422, 394 P.2d 612 (1964); Root v. Mackey, 486 S.W.2d 449 (Mo. 1972); *cf.* Fowler v. Duhme, 143 Ind. 248, 42 N.E. 623 (1896); RESTATEMENT, *supra* note 7, § 406, comment *e* at 2397.

(3) *Restraints Limited to a Small Number of Persons—see, e.g.*, Blevens v. Pittman, 189 Ga. 789, 7 S.E.2d 662 (1940); Overton v. Lea, 108 Tenn. 505, 68 S.W. 250 (1901). *Contra*, Jackson v. Jackson, 215 Ga. 250, 113 S.E.2d 766 (1960); Moffit v. Williams, 116 Neb. 785, 219 N.W. 138 (1928); *see* RESTATEMENT, *supra* note 7, § 406, comment *k*. *See generally* Annot., 36 A.L.R.2d 1437 (1954). Since the decisions in Barrows v. Jackson, 346 U.S. 249 (1953), and Shelley v. Kraemer, 334 U.S. 1 (1948), restrictions to persons based on race or religion are unconstitutional.

(4) *Restraints as Spendthrift Trusts*—Connecticut Bank & Trust Co. v. Hurlbutt, 157 Conn. 315, 254 A.2d 460 (1968); Gunn v. Wagner, 242 Iowa 1001, 48 N.W.2d 292 (1951); Milner v. Outcalt, 36 Wash. 2d 720, 219 P.2d 982 (1950); *accord*, Leigh v. Harrison, 69 Miss. 923, 11 So. 604 (1892); *cf.* Haskell v. Haskell, 234 Mass. 442, 125 N.E. 601 (1920). *Contra*, Hartwell v. Mobile Towing & Wrecking Co., 212 Ala. 313, 102 So. 450 (1924). *See generally* E. GRISWOLD, SPENDTHRIFT TRUSTS (2d ed. 1947); L. SIMES & A. SMITH, *supra* note

approach, restraints on alienation are valid if reasonable under the circumstances of the particular case.[23] Theoretically, when the purpose behind the restraint outweighs its effect in hindering the alienability of property, the standard is satisfied.[24]

7, § 1146; Costigan, *Those Protective Trusts Which Are Miscalled "Spendthrift Trusts" Reexamined*, 22 CALIF. L. REV. 471 (1934); 51 DICK. L. REV. 109 (1947).

(5) *Restraints as Preemption Rights—see, e.g.*, Dodd v. Rotterman, 30 Ill. 62, 161 N.E. 756 (1928); Beets v. Tyler, 365 Mo. 895, 290 S.W.2d 76 (1956). *Contra*, Missouri State Hwy. Comm'n v. Stone, 311 S.W.2d 588 (Mo. App. 1958). *See generally* 6 AMERICAN LAW OF PROPERTY § 26.64-26.67 (A. Casner ed. 1952); Annot., 162 A.L.R. 581 (1946).

[22] Mississippi has developed the exceptions to the majority doctrine within the framework of the law of direct restraints which emphasizes the particular classification of restraint. *See* note 7 *supra*. This emphasis arises from recognition that direct restraints are more prohibitive than indirect ones. Disabling restraints in the form of directions not to alienate, restrain alienability more than conditions forfeiting the estate upon alienation. This analogy can be extended one step further by pointing out the increasing restrictions imposed on alienability when the restraint is attached to an estate for years, an estate for life, or a fee simple estate.

Within this context Mississippi's treatment of direct restraints may be broadly examined. One of the most widely quoted rules in the law of direct restraints is that all disabling restraints, with the exception of spendthrift trusts, are invalid. *See* note 21 *supra*. Mississippi recognized the spendthrift trust exception in Leigh v. Harrison, 69 Miss. 923, 933-34, 11 So. 604, 606 (1892) (the trust offers a means of preserving a source of income for relatives). Yet Mississippi appears to have taken the opposite position with regard to the general rule of disabling restraints. Ford v. Smith, 162 Miss. 138, 137 So. 482, 484-85 (1931); Crawford v. Soloman, 131 Miss. 792, 801-02, 95 So. 686, 687-88 (1923) (upheld a disabling restraint on a legal life estate stating that "under the 'two donee' statute . . . it is competent for a person making a will to limit the right of alienability during the period . . . provided for."). *But see* West Tenn. Co. v. Townes, 52 F.2d 764, 766 (N.D. Miss. 1931) (refusal to uphold disabling restraint on a legal life estate). Although language in both *Crawford v. Soloman*, *supra*, and the later case Russell v. Federal Land Bank, 180 Miss. 55, 75-78, 176 So. 737, 741-42 (1937), implied that Mississippi would allow a disabling restraint on even a fee simple estate, this contention was rejected in Dukes v. Crumpton, 233 Miss. 611, 620-21, 103 So. 2d 385, 388 (1958) (alienation is an incident of a fee estate).

In *In re* Estate of Kelly, 193 So. 2d 575 (Miss. 1967), the court held that a restraint on alienation of a life estate was void, but the court applied the approximation doctrine and adjudicated the restraint valid during the life of the life tenant and invalid thereafter. In Fayard v. Fayard, 293 So. 2d 421, 423 (Miss. 1974), however, the court applied the minority doctrine using a test of reasonableness in determining the validity of a restraint on alienation of personal property. This case indicated that the court was moving toward the minority doctrine, the position accepted for real property security transactions in the instant case. For a concise summary of direct restraints on alienation in Mississippi, see Comment, *Direct Restraints on the Alienation of Property in Mississippi*, 34 MISS. L.J. 333 (1963).

[23] *See, e.g.*, 6 AMERICAN LAW OF PROPERTY, *supra* note 21, § 26.22; Bernhard, *supra* note 17, at 1176; Volkmer, *supra* note 16, at 749 n.12.

An example of this approach can be seen in the Kentucky decisions upholding restraints, if limited to a reasonable time. *See, e.g.*, Robertson v. Simmons, 322 S.W.2d 476, 481-83 (Ky. 1959) (the test of validity of a restraint upon a vested interest is its reasonableness); Hutchison v. Loomis, 244 S.W.2d 751, 752 (Ky. 1951) (restraint upon the alienation of land held in fee is not void if for a reasonable time).

[24] Bernhard, *supra* note 17, at 1176; Comment, *Due on Sale and Due on Encumbrance*

The extent to which the free alienability of real property should be protected is significant in light of the increasing use of "due-on" clauses in mortgage instruments. A due-on clause is one form of acceleration provision found in mortgages, deeds of trust, and promissory notes which confers upon the beneficiary of the security instrument the right to declare the entire debt due and payable upon breach of a specified condition.[25] Due-on clauses were initially

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Clauses In California, 7 LOY. L.A.L. REV. 306, 321 (1974).

> Consideration must be given to the alternative forms a rule of reason may assume. One extreme is a "per se" approach, in which the court decides along sharply-defined lines that certain conduct is or is not reasonable and does not look to the circumstances of the conduct. The opposite extreme is the flexible approach of looking at each case in the light of its circumstances with each decision resulting from a weighing of the policies involved.

Bernhard, *supra* note 17, at 1177.

The distinction between the "majority" approach and "minority" approach in practice is often only one of degree. Many of the recognized exceptions to the "majority" approach incorporate a consideration of reasonableness. *See, e.g.*, Ford v. Smith, 162 Miss. 138, 146-47, 137 So. 482, 484-85 (1931) (restraints on partition are valid if limited in time); *see* L. SIMES & A. SMITH, *supra* note 7, § 1166 (provisions in partnership or corporate charters restricting membership in reasonable ways).

[25] *See, e.g.*, Gunter v. White, 489 S.W.2d 529, 530 (Tenn. 1973).

Although reference is often made to the acceleration provision according to the particular triggering event, it is more appropriate to characterize the provision as a mere "due-on" clause to give greater cognizance to its role as an acceleration device. Specific reference, however, can be made to the triggering event when appropriate. Tucker v. Lassen Sav. & Loan Ass'n, 12 Cal. 3d 629, 630 n.1, 526 P.2d 1169, 1172 n.1, 116 Cal Rptr. 633, 635 n.1 (1974).

Typical examples of "due-on" clauses include:

> *Due-On-Sale Clause*
>
> That if the [mortgagor] shall sell, convey, or alienate said property . . . without the written consent of the [mortgagee]. . .[mortgagee] shall have the right, at its option, to declare any indebtedness or obligations secured . . . immediately due and payable.

Cherry v. Home Sav. & Loan Ass'n, 276 Cal. App. 2d 574, 575, 81 Cal. Rptr. 135, 136 (2d Dist. Ct. App. 1969).

> *Due-On-Encumbrance Clause*
>
> Should [mortgagor] sell, convey, transfer, dispose of or further encumber said property, or any part thereof . . . without the written consent of [mortgagee] . . . then [mortgagee] shall have the right . . . to declare all sums secured . . . due and payable.

La Sala v. American Sav. & Loan Ass'n, 5 Cal. 3d 864, 869, 489 P.2d 1113, 1115, 97 Cal. Rptr. 849, 851 (1971).

Several Courts make reference to "consent-to-sale" clauses. Conceptually there is no difference between due-on clauses and consent-to-sale clauses. Both operate to accelerate the principal indebtedness upon breach of the restraining provision. *See* Comment, *Mortgage Consent-to-Sale Clause: A Reasonable Restraint on Alienation*, 8 JOHN MARSH. J. PRAC. & PROC. 512, 528 n.72 (1975). The various jurisdictions have made virtually no distinction between these two clauses in applying the rule against restraints on alienation. *Compare* Baker v. Loves Park Sav. & Loan Ass'n, 21 Ill. App. 3d 42, 314 N.E.2d 306 (1974), *with* Malouf v. Midland Fed. Sav. & Loan Ass'n, 181 Col. 294, 509 P.2d 1240 (1973) (en

invoked only upon default in payment of principal or interest.[26] Use of these clauses expanded, however, with the appearance of two distinct types of acceleration provisions: due-on-sale clauses, triggered when the borrower (mortgagor) conveyed the secured property without the lender's consent; and due-on-encumbrance clauses, triggered by creating a junior encumbrance without the lender's approval.[27] Traditionally, due-on clauses were necessary to protect the lender from the "moral risks" of waste, abuse, or diminution of the security which could result from conveyance to a party with a poor credit rating or reputation for abuse of property.[28] This justification has received unquestioned acceptance in all jurisdictions.[29]

Restraints in mortgage instruments were seldom contested prior to the 1960's.[30] During the decade of the 1960's, however, rising interest rates,[31] high inflation, and the rapid growth of savings and loan institutions[32] resulted in the

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banc), *and* Mutual Fed. Sav. & Loan Ass'n v. Wisconsin Wire Works, 58 Wis. 2d 99, 205 N.W.2d 762 (1973).

Due-on-sale clauses have been classified as direct restraints despite the obvious problem of placement within an established category. *See* L. SIMES & A. SMITH, *supra* note 7, § 1161. This argument would classify a contract against alienation as a promissory restraint which has only an indirect effect on alienation. However, the proper classification should depend "not on the manner in which the provision against alienation is enforced, but on the directness or indirectness with which restraining alienation is indicated as a primary purpose." *Id.*

[26] Comment, *Mortgages—A Catalogue and Critique on the Role of Equity in the Enforcement of Modern-Day "Due-On-Sale" Clauses*, 26 ARK. L. REV. 485 (1973).

[27] *See* note 25 *supra*. In the typical operation of a "due-on" clause the borrower and lender enter into a security agreement which incorporates a "due-on" provision. If the borrower conveys or further encumbers the property, the lender may exercise one of several options. He may declare the outstanding debt due and foreclose or agree to waive the rights of acceleration conditioned upon a combination of payment by the vendee of an assumption fee or execution of an agreement to assume the mortgage at a higher interest rate.

[28] *See generally* Hetland, *Real Property and Real Property Security: The Well Being of the Law*, 53 CALIF. L. REV. 151, 170 (1965); Valensi, *The Due on Sale Clause: A Dissenting Opinion*, 45 L.A. BAR BULL. 121 (1970).

[29] Comment, *supra* note 26, at 493. *Compare* Cherry v. Home Sav. & Loan Ass'n, 276 Cal. App. 2d 574, 81 Cal. Rptr. 135 (2d Dist. Ct. App. 1969), *with* People's Sav. Ass'n v. Standard Indus., Inc., 22 Ohio App. 2d 35, 257 N.E.2d 406 (1970).

[30] The explanation for this absence is attributable to the traditional "restraints" doctrine which concluded that direct restraints on the alienation of fee simple estates were void. *See* L. SIMES & A. SMITH, *supra* note 7, §§ 1148, 1161. The restraints doctrine was discussed, however, in an analogous situation. Vendors in installment land contracts had traditionally inserted forfeiture provisions in attempting to restrict the land contract vendee's interest. *See, e.g.*, Sloman v. Cutler, 258 Mich. 372, 242 N.W. 735 (1932) (this decision is considered the landmark case upholding nonassignment provisions in installment land contracts).

[31] Volkmer, *supra* note 16, at 769, *citing* 1970 FED. HOME LOAN BANK BD. 6, chart 2; 1969 FED. HOME LOAN BANK BD. 3, chart 1.

[32] *See* Bonanno, *Due on Sale and Prepayment Clauses in Real Estate Financing in California in Times of Fluctuating Interest Rates—Legal Issues and Alternatives*, 6 U.S.F.L. REV. 267, 267-270 (1972).

extensive use of due on clauses.[33] In this financial atmosphere mortgage lenders threatened to enforce due-on clauses in order to renegotiate frozen interest rates, thus being assured that their lending funds would be maintained at current interest levels[34] even though the security for the debt remained unimpaired. As a result of this practice, savings and loan institutions could maintain long term investment portfolios at or near the current market rate.[35] Unlike uniform enforcement of due-on clauses to protect the lender's interest in the security, these clauses, when used to monitor interest rates, have received mixed treatment in the state courts.[36] Focusing upon the *cause* for acceleration, the courts have sought to determine what threats to the mortgage lender's legitimate interests are sufficient to justify the demand for immediate repayment of the debt.

Due-on clauses were first upheld by the California Supreme Court in the landmark case, *Coast Bank v. Minderhout*.[37] Writing for the majority, Justice

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[33] *See generally* Hetland, *supra* note 28, at 165-170.

[34] This new factor—the interest rate argument—as a justification for the use of a due-on clause is clearly stated in Cherry v. Home Sav. & Loan Ass'n, 276 Cal. App. 2d 574, 579, 81 Cal. Rptr. 135, 138 (2d Dist. Ct. App. 1969):

> When interest rates are high, a lender runs the risk they will drop and that the borrower will refinance his debt elsewhere at a lower rate and pay off the loan, leaving the lender with money to loan but at a less favorable interest rate. On the other hand, when money is loaned at low interest, the lender risks losing the benefit of a later increase in rates. As one protection against the foregoing contingency, a due-on-sale clause is employed permitting acceleration of the due date by the lender so that he may take advantage of rising interest rates in the event his borrower transfers the security.

For an excellent discussion of the interest rate maximization argument, see Malouf v. Midland Fed. Sav. & Loan Ass'n, 181 Colo. 294, 509 P.2d 1240, 1244 (1973) (where the court took judicial notice of the fact that "the imbalance between the loan demand and the money supply, arising out of an inflationary economy, required that . . . lending institutions adopt measures which would protect borrowers . . . from the hazards of long-term loans . . . at fixed interest rates"); *accord*, Stith v. Hudson City Sav. Inst., 63 Misc. 2d 863, 313 N.Y.S.2d 804 (Sup. Ct. 1970); Gunther v. White, 489 S.W.2d 529 (Tenn. 1973) (acts related to securing a current, lawful rate of interest are neither unconscionable nor inequitable); *cf.* People's Sav. Ass'n v. Standard Indus., Inc., 22 Ohio App. 2d 35, 257 N.E.2d 406 (1970) (upholding acceleration upon failure of the mortgagor to renegotiate the note and mortgage at an increased interest rate); Mutual Fed. Sav. & Loan Ass'n v. Wisconsin Wire Works, 58 Misc. 2d 99, 205 N.W.2d 762 (1973).

[35] For a comprehensive review of the interest rate considerations and relation of due-on clauses to the mortgage money market, see Comment, *Use of "Due-on" Clauses to Gain Collateral Benefits: A Common Sense Defense*, 10 TULSA L.J. 590, 592-94 (1975).

[36] *See* notes 29 & 34 *supra*. *Compare* Cherry v. Home Sav. & Loan Ass'n, 276 Cal. App. 2d 574, 578, 81 Cal. Rptr. 135, 138 (2d Dist. Ct. App. 1969) (no "inequity visible" in allowing acceleration in order to take advantage of rising interest rates), *with* Clark v. Lachenmeier, 237 So. 2d 583, 584 (Fla. 2d Dist. Ct. App. 1970) (the right to accelerate is recognized when the default is related to "preservation of the security"), *and* Baltimore Life Ins. Co. v. Harn, 15 Ariz. App. 78, 81, 486 P.2d 190, 193 (Ct. App. 1971) (acceleration denied when there was no showing of violation of the substance of the agreement or danger to the security).

[37] 61 Cal. 2d 311, 392 P.2d 265, 38 Cal. Rptr. 505 (1964). For an early discussion of this decision, see Comment, *Coast Bank v. Minderhout and the Reasonable Restraint on*

Traynor found that the parties' "agreement" was not an unenforceable restraint on alienation. Conditioning the continued extension of credit on the borrower retaining an interest in the property was reasonable.[38] In reaching this conclusion, *Coast Bank* adopted the "minority doctrine"[39] and provided a foundation for future approaches to restraints in real property security transactions.[40] Rejecting the proposition that due-on clauses are per se invalid,[41] the validity of a restraint after *Coast Bank* would depend upon its reasonableness in view of the legitimate interests of the parties. The decision failed to explain, however, the more difficult question of how the reasonableness standard was to be applied. The *Coast Bank* rationale was further expounded in *Cherry v. Home Savings & Loan Association*.[42] In *Cherry*, a declaratory judgment was sought against the mortgage lenders to obtain relief from "due-on-sale" provisions in a deed of trust which had required payment of a higher interest rate, assumption of the prior note, and imposition of an assumption fee.[43] The Court of Appeals for the Second District of California held that the lending association could validly enforce the due-on-sale provisions, rejecting the contention that a mortgagee is governed by an implied covenant of reasonableness in the use of a due-on-sale clause in a deed of trust.[44] *Cherry* clearly formulated a rule of automatic enforcement for due-on-sale clauses.[45] No allegation of jeopardy to the security was necessary.

Alienation: Creature of Commercial Ambiguity, 12 U.C.L.A.L. REV. 954 (1965).

[38] 61 Cal. 2d at 314, 392 P.2d at 268, 38 Cal. Rptr. at 508.

[39] *See* Bernhard, *supra* note 17.

[40] The view that the common-law rule against restraints on alienation prohibits all such restraints has been forcefully criticized on the ground that it loses sight of the purposes of the rule and needlessly invalidates *reasonable restraints designed to protect the justifiable interest of the parties.*

61 Cal. 2d at 314, 392 P.2d at 268, 38 Cal. Rptr. at 508 (emphasis added).

[41] *See, e.g.*, Mutual Fed. Sav. & Loan Ass'n v. Wisconsin Wire Works, 58 Wis. 2d 99, 205 N.W.2d 762, 769 (1973); Malouf v. Midland Fed. Sav. & Loan Ass'n, 181 Colo. 294, 509 P.2d 1240, 1243-44 (1973); *cf.* Baltimore Life Ins. Co. v. Harn, 15 Ariz. App. 78, 81, 486 P.2d 190, 193 (1971) (acceleration clause not void as long as it does not absolutely restrict the mortgagor's ability to alienate the property); Walker Bank & Trust Co. v. Neilsen, 26 Utah 2d 383, 384, 490 P.2d 328, 329 (1971) (dictum) (pointing out trial court error in holding that the acceleration clause was against public policy).

[42] 276 Cal. App. 2d 574, 81 Cal. Rptr. 135 (2d Dist. Ct. App. 1969), *disapproved in part*, Tucker v. Lassen Sav. & Loan Ass'n, 12 Cal. 3d 629, 526 P.2d 1169, 116 Cal. Rptr. 633 (1974).

[43] 276 Cal. App. 2d at 575-76, 81 Cal. Rptr. at 136-37.

[44] *Id.* at 579, 81 Cal. Rptr. at 139.

[45] The trend towards an automatic standard began immediately in the California appellate courts. *See* Jones v. Sacramento Sav. & Loan Ass'n, 248 Cal. App. 2d 522, 56 Cal. Rptr. 741, 745 (3d Dist. Ct. App. 1967) (upholding the validity of acceleration options without reviewing a test of enforcement); Hellbaum v. Lytton Sav. & Loan Ass'n, 274 Cal. App. 2d 456, 79 Cal. Rptr. 9, 11 (1st Dist. Ct. App. 1969) (agreements not to transfer or encumber property are not invalid restraints). At least in the California courts, automatic enforcement of due-on-sale clauses has been limited to where the acceleration provision is triggered by an outright sale of the property. *See* Tucker v. Lassen Sav. & Loan Ass'n, 12 Cal. 3d 629, 526 P.2d 1169, 116 Cal. Rptr. 633 (1974). *See also* notes 59 through 62 and accompanying text *supra*.

The decision is significant, however, for recognizing the value of due-on-sale clauses in maintaining both the borrower's responsibility for the security[46] and in protecting the lender from the risk of rising interest rates.[47] Although the *Coast Bank* and *Cherry* decisions have been followed in jurisdictions adopting a rule of automatic enforcement for all due-on clauses,[48] divergent opinion exists about whether due-on clauses are properly used in obtaining an increase in the interest rate.[49] Not all variations of due-on clauses have been accorded per se validity. Following *Cherry*, a contrasting approach to an automatic reasonableness standard developed in relation to due-on clauses triggered by a further encumbrance[50] or by conveyance in the form of an installment land contract.[51] While these decisions adhere to the basic tenet of *Coast Bank*—that restraints may be valid if reasonably related to the lender's legitimate interests—the due-on clauses were enforceable only when reasonably related to protection of the lender's security.[52] In *La Sala v. American Savings & Loan Association*[53] due-

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The California decisions offer an excellent example of the development of an automatic enforcement rule and a later progression into the reasonableness test in certain situations. They are discussed in detail in the text. For other discussions of the California line of cases, see Praw & Duffy, *Enforceability of Due-on-Sale Clauses After Tucker v. Lassen Sav. & Loan Ass'n*, Vol. 8, No. 6 J. Bev. H. Bar Ass'n 11 (Jan.-Feb. 1975); Reichman, *The Anti-Lien: Another Security Interest in Land*, 41 U. Chi. L. Rev. 685 (1974); Note, *Mortgages: Restrictions on Transfer of the Fee-Effect of Due-on-Sale Clauses*, 28 Okla. L. Rev. 418 (1975).

[46] 276 Cal. App. 2d 578, 81 Cal. Rptr. 138 (2d Dist Ct. App. 1969).

[47] *Id. See also* notes 34 & 35 and accompanying text *supra*.

[48] People's Sav. Ass'n v. Standard Indus., Inc., 22 Ohio App. 2d 35, 257 N.E.2d 406 (1970), is indicative of the rule in other jurisdictions. The Ohio Supreme Court in upholding the validity of a due-on-sale clause in a mortgage stated:

> The right of the mortgagee to protect its security by maintaining control over the identity and financial responsibility of the purchaser is a legitimate business objective and is not illegal, inequitable or contrary to the public policy.

Id. at 38, 257 N.E.2d at 408.

[49] *Compare* Malouf v. Midland Fed. Sav. & Loan Ass'n, 181 Colo. 294, 298-99, 509 P.2d 1240, 1244-45 (1973), *and* Gunther v. White, 489 S.W.2d 529, 530-32 (Tenn. 1973), *with* Tucker v. Lassen Sav. & Loan Ass'n, 12 Cal. 3d 629, 635-36 n.10, 526 P.2d 1169, 1175-76 n.10, 116 Cal. Rptr. 633, 639-40 n.10; Baker v. Loves Park Sav. & Loan Ass'n, 61 Ill. 2d 119, 122-23, 333 N.E.2d 1, 4-5 (1975); People's Sav. Ass'n v. Standard Indus., Inc., 22 Ohio App. 2d 35, 36-38, 257 N.E.2d 406, 407-08 (1970).

[50] *See* note 55 *infra*.

[51] *See* text accompanying notes 60 & 61 *infra*.

[52] Additional support for a flexible, reasonableness standard was presented in decisions involving the enforceability of forfeiture clauses triggered by breach of nonassignment provisions by the vendee in a land contract. In Pellerito v. Weber, 22 Mich. App. 242, 177 N.W.2d 236 (1970), a land contract vendor commenced foreclosure action when the property subject to the installment contract of sale was conveyed to a third party in violation of the nonassignment provision in the contract. The Michigan Court of Appeals enjoined the foreclosure action on the grounds that the plaintiffs did not make "any allegations of waste or impairment or loss of security." *Id.* at 244, 177 N.W. 2d at 238. This decision was followed in Lemon v. Nicholai, 33 Mich. App. 646, 647, 190 N.W.2d 549, 550 (1971), where the court denied foreclosure when the mortgage payments were being tendered promptly by the new purchaser. *See also* Goddard, *supra* note 7.

on-sale and due-on-encumbrance clauses were first distinguished[54] with the California Supreme Court holding that due-on-encumbrance clauses were not entitled to the automatic enforcement standard accorded due-on-sale clauses. Instead, due-on-encumbrance clauses would be upheld only when "reasonably necessary to protect the lender's security,"[55] and not merely to exact the commercial benefit of an increased interest rate.[56] The limits of automatic enforcement of due-on-sale clauses—implicit in *Cherry*[57] and acknowledged in *La Sala*[58]—were further restricted in *Tucker v. Lassen Savings & Loan Association*.[59] In *Tucker* the court expressly rejected the interest rate justification of due-on clauses holding that a lender's interest in maintaining its portfolio at current interest rates does not justify the restraint imposed by the exercise of a due-on clause upon the execution of an installment land contract.[60] As in *La Sala*, the legitimate interests sufficient to justify acceleration were restricted to "preserving the security from waste or depreciation . . . [and] the 'moral risks' of having to resort to the security upon default."[61] California's bifurcated treatment of due-on clauses has, in effect, limited per se enforcement to due-on provisions accelerated by outright sales[62] while requiring a threat to the lender's security for all other due-on clauses.

A clear alternative to automatic enforcement[63] and strict categorization of

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[53] 5 Cal. 3d 864, 489 P.2d 1113, 97 Cal. Rptr. 849 (1971). *La Sala* was a class action challenging the validity of a standard deed of trust clause giving the beneficiary the right to declare the mortgage due and payable, "should Trustor sell, convey, transfer, dispose of or . . . encumber said property . . . without the written consent of [the] Beneficiary . . . ." *Id.* at 869, 489 P.2d at 1115, 97 Cal. Rptr. at 851. The foreclosure action was initiated 6 years after the original loan when the mortgagor executed a second deed of trust on the property and refused to accept an increase in the interest rate to prevent foreclosure.

[54] The due-on-sale/due-on-encumbrance distinction is examined in Comment, *Applying the Brakes to Acceleration Clauses: Controlling Their Misuse in Real Property Secured Transactions*, 9 CALIF. W.L. REV. 514 (1973).

Distinguishing between the two clauses has been frequently criticized since the mortgagee's interest is not always jeopardized by a subsequent sale of the property such as when the transfer is made to a party more solvent or as solvent as the original mortgagor. *See* Comment, *supra* note 24, at 324-26; Note, *supra* note 45, at 421-23.

[55] 5 Cal. 3d 878, 489 P.2d 1121, 97 Cal. Rptr. 857 (1971).

La Sala further recognized that tendering to the mortgage lender an absolute right to determine whether the transaction necessitated enforcement of the due-on-encumbrance clause created a serious potential for abuse. Mortgage lenders were in many situations requiring payment of a fee or other valuable consideration in exchange for waiver of the right to accelerate. This uncontrolled discretion, in effect, provided a means of obtaining from a borrower numerous concessions no matter how inequitable such demands may be. *Id.* at 881, 489 P.2d at 1124, 97 Cal. Rptr. at 860.

[56] 5 Cal. 3d at 880-81 n.17, 489 P.2d at 1123-24 n.17, 97 Cal. Rptr. at 859-60 n.17.

[57] See notes 46 & 47 and accompanying text *supra*.

[58] See notes 54 & 55 and accompanying text *supra*.

[59] 12 Cal. 3d 629, 526 P.2d 1169, 116 Cal. Rptr. 633 (1974).

[60] *Id.* at 639-40 n.10, 526 P.2d at 1175-76 n.10, 116 Cal. Rptr. at 639-40 n.10.

[61] *Id.* at 639, 526 P.2d at 1175, 116 Cal. Rptr. at 639.

[62] *Id.* at 634 n.6, 526 P.2d at 1172 n.6, 116 Cal. Rptr. at 636 n.6.

[63] *See* notes 45 through 49 and accompanying text *supra*.

due-on clauses[64] can be found in jurisdictions embracing the classic role of the equity court in preventing foreclosure when the result would be inequitable or unconscionable.[65] The role of equity is a recent development in the search for a solution to enforcement of due-on clauses.[66] These decisions reaffirm *Coast Bank's* basic principle that due-on clauses are not per se invalid.[67] Nevertheless, implicit recognition is given to the proposition that all due-on clauses may be invoked in an unreasonable manner.[68] The judicial philosophy expressed in these jurisdictions can be seen in *Baltimore Life Insurance Co. v. Harn*.[69] In *Harn* the assignee of the mortgage sought to exercise the due-on clause and foreclose when the mortgagor executed an agreement for sale and conveyance. The court found that the agreement to sell was a conveyance within the scope of the due-on clause but refused to permit foreclosure merely upon the allegation that the clause had been violated. While recognizing that acceleration clauses are bargained-for elements of mortgage transactions designed to protect a lender's interests, the court concluded that "[a]bsent an allegation that the purpose of the clause is . . . being circumvented or that the mortgagee's security is jeopardized, a plaintiff cannot be entitled to equitable relief."[70] In *Tucker v. Pulaski Savings & Loan Association*,[71] a case of first impression, the Arkansas Supreme Court adopted the *Harn* rationale, holding that legitimate grounds must exist for refusing to accept a transfer of the property.[72] The court noted that there had been no default in payments and emphasized that the mortgagee could not accelerate and foreclose upon the property simply because the due-on clause had been violated.[73] The court cited *Harn* for the proposition that equitable relief would be available only when the security is jeopardized.[74] Following this ap-

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[64] *See* notes 53 through 60 and accompanying text *supra*.

[65] Tucker v. Pulaski Fed. Sav. & Loan Ass'n, 252 Ark. 849, 481 S.W.2d 725 (1972); Baltimore Life Ins. Co. v. Harn, 15 Ariz. App. 78, 486 P.2d 190 (1971); Clark v. Lachenmeier, 237 So. 2d 583 (Fla. 2d Dist. Ct. App. 1970). *See generally* Comment, *supra* note 26.

[66] Equity has always been the final arbiter of foreclosure proceedings and the protector of the rights of mortgagors. *See generally* Graf v. Hope Bldg. Corp., 254 N.Y. 1, 171 N.E. 884, 886-89 (1930) (Cardozo, C.J., dissenting).

[67] *See, e.g.*, Baltimore Life Ins. Co. v. Harn, 15 Ariz. App. 78, 79-80, 486 P.2d 190, 192-93 (1971) (The court rejected the contention that acceleration clauses are void as against public policy and recognized such clauses as bargained-for elements of a mortgage, protecting the mortgagee from risks associated with transfer.). *See also* note 41 and accompanying text *supra*.

[68] *See, e.g.*, Clark v. Lachenmeier, 237 So. 2d 583, 584 (Fla. 2d Dist. Ct. App. 1970) (Equity courts may prevent foreclosure if acceleration would be "unconscionable" or the "result inequitable or unjust."); Lieberbaum v. Surfcomber Hotel Corp., 122 So. 2d 28, 29-30 (Fla. 1960) (inequitable to permit acceleration without first giving the mortgagor an opportunity to pay the amount in default even though the grace period for receiving payment had expired).

[69] 15 Ariz. App. 78, 486 P.2d 190 (1971).

[70] *Id.* at 81, 486 P.2d at 193.

[71] 252 Ark. 849, 481 S.W.2d 725 (1972).

[72] *Id.* at 853, 481 S.W.2d at 729.

[73] *Id.* at 852, 481 S.W.2d at 728.

[74] *Id.* at 852-53, 481 S.W.2d at 728-29.

proach, the equity courts have repudiated enforcement of due-on clauses except when there is a detriment to the security.[75] The legitimate interests justifying this rule generally represent two factors: An interest in preserving the security against waste and depreciation and an interest in guarding against the risk of resorting to the security upon default.[76] Absent a showing that one of these legitimate interests has been threatened, the equity courts will find due-on clauses void as an unreasonable restraint on alienation.

In the instant decision, the court observed that the validity of provisions in mortgage security instruments which provide that the fee owner may not sell or encumber the secured property without the written consent of the mortgagee was a question of first impression in Mississippi. An analogy was drawn to the recent decision, *Fayard v. Fayard*,[77] where the court applied a reasonableness test in upholding the validity of a restraint on the right to alienate personal property.[78] After reviewing the common law principles limiting the exclusion of property from the channels of commerce[79] and favoring a strict construction of restraints, the court nevertheless reasoned that such restraints are not per se invalid. The court concluded that since restraints on alienation may be valid if reasonable under the circumstances, and since the conveyance in question was not a threat to either the security or any of the legitimate interests of the mortgagee, the restraint was therefore invalid as an unreasonable restraint on alienation. The court expressly reserved for later consideration the issue of what constitutes a threat to the mortgagee's legitimate interests.

The Mississippi Supreme Court, in the instant decision, has taken a step towards equalizing the competing interests in real property security transactions. *Sanders v. Hicks* informs mortgage lenders and borrowers that due-on clauses are not per se invalid restraints against alienation and will be enforced when reasonable in light of the justifiable interests of the parties. The court recognizes that prohibition under all circumstances would be detrimental to the interests of both mortgagors and mortgagees. If denied use of due-on clauses, even in the face of a legitimate threat to the security, the mortgagee would be

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[75] *See, e.g.*, Baltimore Life Ins. Co. v. Harn, 15 Ariz. App. 78, 486 P.2d 190 (1971); Tucker v. Pulaski Fed. Sav. & Loan Ass'n, 252 Ark. 849, 481 S.W.2d 725 (1972); Clark v. Lachenmeier, 237 So. 2d 583 (Fla. 2d Dist. Ct. App. 1970).

[76] See cases cited in note 75 *supra*.

[77] 293 So. 2d 421, 423 (Miss. 1974). In *Fayard* the court examined a restraint on the alienation of corporate stock and commented:

> Restrictions upon the right to transfer were once regarded with disfavor by the courts upon the theory that they impinged upon the right to alienate personal property. As a general proposition today a majority of the courts will sustain the restrictions in close corporations which are determined to be reasonable in the light of the relevant circumstances. . . . The underlying test for determining reasonableness is whether the restraint is sufficiently needed by the particular enterprise to justify overriding the general policy against restraints on alienation [citations omitted].

[78] *Fayard* was relevant to the instant case "since the principles of law which prevent a person from imposing restraints on alienation apply equally to personal property and to real estate." Sanders v. Hicks, 317 So. 2d 61, 64 (Miss. 1975).

[79] "The general common-law rule is that exclusion of property from the channels of commercial development for extended periods of time is a public evil." *Id.* at 63.

required to forfeit a device which safeguards the collateral.[80] Consequently, the risks inherent in all loans, including the most secure, would be increased. The mortgagor's interests would also suffer from invalidation of due-on clauses in all situations. Without this protection, mortgagees would be encouraged to tighten financial qualifications for an extension of credit. The ultimate result would be a reduction in the number of available mortgages with the ability to purchase a home placed beyond the reach of a larger portion of the public. This could further decrease production in housing, an industry extremely sensitive to changes in lending policies and fluctuations in the capital money market.[81] Drawing support from the "minority doctrine"[82] is logical from a policy standpoint. A reasonableness standard allows the court to look beyond the face of an instrument in order to balance the factors motivating the lender to accelerate[83] with the common law policy which prohibits restraints. The superficial evaluation of the restraint in question as one unrelated to the legitimate interests of the mortgage beneficiaries,[84] however, has left unanswered the more complex issue of the legitimate interests sufficient to justify acceleration of due-on provisions. This acquiescence has placed the state of the law in Mississippi in much the same posture as that of California following *Coast Bank v. Minderhout*.[85] It should be emphasized that a distinction between the various due-on clauses should not be drawn.[86] Despite the court's citation of *Tucker v. Lassen Savings & Loan Association*,[87] in which the California Supreme Court distinguished due-on-sale clauses triggered by "outright sales," there is no rational basis for divergent treatment. A consistent approach requires one standard for all due-on provisions.[88] In approving *Tucker v. Pulaski Federal Savings & Loan Assocation*,[89] *Baltimore Life Insurance Co. v. Harn*,[90] and *Liberbaum v. Surfcomber Hotel Corp.*,[91] the court has aligned Mississippi with the jurisdictions following a strict equity approach in relation to all due-on clauses and provided the basis for future judicial direction.[92] These decisions recognize that the interests sufficient to justify acceleration are restricted to legitimate threats to the security, including the risk of waste or depreciation and the risk of having

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[80] *See* notes 28 & 29 and accompanying text *supra*.

[81] *See* Comment, *supra* note 24, at 313-15.

[82] *See* Bernhard, *supra* note 17, at 1176.

[83] See note 75 and accompanying text *supra*.

[84] "[T]he Court will proceed to determine the enforceability of the restriction as one unrelated to any threat to the legitimate interests of the beneficiaries." Sanders v. Hicks, 317 So. 2d 61, 63 (Miss. 1975).

[85] 61 Cal. 2d 311, 314, 392 P.2d 265, 268, 38 Cal. Rptr. 505, 508, (1964) (where the court generally approved "reasonable restraints designed to protect justifiable interests of the parties," but did not answer the crucial question of what constitutes a justifiable interest).

[86] *See* note 54 and accompanying text *supra*.

[87] 12 Cal. 3d 629, 526 P.2d 1169, 116 Cal. Rptr. 633 (1974).

[88] *See generally* Praw & Duffey, *supra* note 45.

[89] 252 Ark. 849, 481 S.W.2d 725 (1972).

[90] 15 Ariz. App. 78, 486 P.2d 190 (1971).

[91] 122 So. 2d 28 (Fla. 1960).

[92] See note 65 and accompanying text *supra*.

to resort to the security upon default.[93] The court recognizes the mortgage lender's interest in the borrower's transferee since this party may be a poor credit risk or may depreciate the security. While some jurisdictions permit lenders to enforce due-on-clauses in order to maintain interest portfolios at a current rate of interest,[94] the court did not acknowledge this purpose as a valid reason for acceleration. As this issue has not been explicitly decided, the argument will be posed that economic realities require enforcement of due-on clauses even if used solely to raise interest rates.[95] Conceding the adoption of a reasonableness standard within the bounds of the equity decisions,[96] future litigation in Mississippi will consist of setting forth guidelines which define legitimate threats to the mortgagee's security interest. Several factors must be weighed in this balancing process, including the personal qualifications and financial responsibility of the transferee,[97] the ratio of the outstanding debt to the value of the security,[98] the likelihood or evidence of future waste or depreciation of the secured property, and the principles of fairness and good faith found in all equitable proceedings.[99] The consequences of adopting a reasonableness standard are harsh. The courts have assumed the task of steering an uncertain course through an area where "predictability of judicial result is of paramount importance."[100] From the mortgage lender's viewpoint, proof of impairment of the security interest will require investigating a prospective purchaser and reviewing the probabilities of economic detriment to the security in each transaction. Further, the prospect of immediate litigation in the event the mortgagor protests the acceleration will also exist.[101] This arguably may be a small price

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[93] *See* notes 65 through 76 and accompanying text *supra*.

[94] *See* notes 29 & 34 and accompanying text *supra*.

[95] *See generally* Comment, *Acceleration Clauses as a Protection for Mortgagees in a Tight Money Market*, 20 S. DAK. L. REV. 329 (1975).

[96] *See* notes 65 through 76 and accompanying text *supra*.

[97] *See, e.g.*, People's Sav. Ass'n v. Standard Indus., Inc., 22 Ohio App. 2d 35, 36-37, 257 N.E.2d 406, 407-08 (1970) ("[A] significant element in the mortgage contract is the mortgagor himself, his financial responsibility and his personal attitudes."). The major factors present in this standard will include the prospective purchaser's income, credit rating, employment record, and net worth.

[98] This factor is the ratio of the outstanding indebtedness to the security value. Consideration of the specific percentage will offer a quantitative factor to be reviewed at the time of transfer or encumbrance. *See* Comment, *Debtor-Selection Provisions Found in Trust Deeds and the Extent of Their Enforceability in the Courts*, 35 S. CAL. L. REV. 475, 482 (1962); Comment, *Judicial Treatment of the Due-on-Sale Clause: The Case for Adopting Standards of Reasonableness and Unconscionability*, 27 STAN. L. REV. 1109, 1122 (1975).

[99] See note 65 and accompanying text *supra*.

[100] Manning, *supra* note 7, at 405.

[101] This reasonableness approach can be attacked as a nebulous test that offers "floodgate litigation" for the future. *See* L. SIMES & A. SMITH, *supra* note 7, § 1150.5 (Supp. 1972). It is not self-evident, however, "that the reasonableness standard here will be any more unsettling than it has proved to be in other areas of the law, where it has been successfully applied." Bernhard, *supra* note 17, at 1187 n. 72. Indeed, empirical data from jurisdictions that have adopted the reasonableness standard in testing the validity of restraints on alienation, do not show a significant rise in the amount of litigation. *Id.* at 1186.

to pay for the benefits mortgage lenders receive from the determination that due-on clauses are not per se void. Given the present uncertainty in the state of the law and the knowledge that these considerations will be resolved as the court develops precise standards of enforcement, a reasonableness standard[102] in line with the equity decisions provides the best criteria for adequately protecting the interests of both mortgagors and mortgagees.

James Lawrence Jones
Charles David Swenson

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[102] Further, it is reasonable to predict that if this approach guides future decisions, mortgage lenders will use variable rate mortgage clauses which vary the interest rate according to economic changes. *See* Comment, *The Variable Interest Rate Clause and Its Use in California Real Estate Transactions*, 19 U.C.L.A.L. Rev. 468, 470 (1970).

STATE TAXATION—CORPORATIONS—UNITARY INCOME OF AFFILIATED CORPORATIONS NOT APPORTIONABLE IN SAME MANNER AS UNITARY INCOME OF SINGLE CORPORATION

The Universal Manufacturing Corporation of Mississippi (Universal), a wholly owned domestic subsidiary of a foreign corporation, conducts business solely within Mississippi.[1] Universal's only income source is revenue received from its parent corporation in exchange for Universal's goods. Having computed and paid its state income taxes on the basis of its annual gross income,[2] Universal contested a Mississippi State Tax Commission order assessing additional income taxes for 1969, 1970, and 1971. Universal contended that while subsection 27-7-15(b)[3] authorizes the State Tax Commission to determine the true

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[1] Universal assembles electrical ballasts used in electrical equipment manufactured and distributed by Universal Manufacturing Corporation, a New Jersey corporation. The New Jersey corporation maintains Universal's books and records in New Jersey, provides Universal with services and advice, and controls Universal's operation. The New Jersey corporation also conducts business in Mississippi as well as in several other states and was required by MISS. CODE ANN. § 27-7-23(1)(c) (1972), to pay an income tax for 1969, 1970, and 1971 on that portion of its income attributable to Mississippi. Universal Mfg. Corp. v. Brady, 320 So. 2d 784, 785 (Miss. 1975).

Section 27-7-23(1)(c) provides:

> In the cases of gross income derived from sources partly within and partly without the state, the net income may first be computed by deducting the expenses, losses, or other deductions apportioned or allocated thereto, and a ratable part of any expenses, losses, or other deductions which cannot definitely be allocated to some item or class of gross income; and the portion of such taxable income attributable to sources within the state may be determined by processes or formulas of general apportionment, prescribed by the commissioner, with the approval of the governor.

The amount of the New Jersey corporation's income attributable to Mississippi was determined by using an apportionment formula provided by Miss. Tax Reg. 1.9220-12(7)(c). 320 So. 2d at 785. The applicable part of the regulation provides:

> (c) (Apportionment of unitary net income of manufacturers). Manufacturers shall apportion a part of their unitary net income to this state by the use of a ratio which shall be the arithmetical average of the following three ratios: (1) Manufacturing assets owned or used in Mississippi to total manufacturing assets. (2) Mississippi manufacturing labor to total manufacturing labor. (3) Mississippi sales to total sales.

Miss. Tax Reg. 1.9220-12(7)(c) *republished as* Miss. Tax Reg. 1.27-7-23(7)(c) of *Income Tax Law, Rules and Regulations*, found in 1 CCH STATE TAX REP., MISS. ¶ 12-435 (1974).

[2] Universal's gross income depended upon the amount of profits made for assembling the electrical ballasts. The New Jersey corporation had set up the books of both corporations so that the compensation paid Universal yielded a profit equal to 1 percent of the cost of the assembled part. 320 So. 2d at 785.

[3] MISS. CODE ANN. § 27-7-15(b)(1972). The subsection provides:

> (b) In determining gross income, as regards sales or exchanges from one to another of affiliated companies or persons or under other circumstances where the relation between the buyer and seller is such that gross proceeds from the sale or the value of the exchanges are not indicative of the true value of the subject matter of the sale or exchanges, the commissioner shall prescribe uniform and equitable rules for determining the value of the gross income, gross

value of transactions between affiliated corporations, the commission, relying on a tax regulation promulgated under that subsection, improperly had recomputed Universal's gross income applying an apportionment formula to the combined incomes of Universal and the affiliated foreign corporation.[4] The Chancery Court of Hinds County affirmed the State Commission's order. On appeal to the Mississippi Supreme Court, *held*, reversed and rendered. When computing a domestic corporation's gross income, subsection 27-7-15(b) requires that the

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sales or exchanges corresponding as nearly as possible to the gross income or the gross proceeds from the sale of similar products or property of like quality or character by other taxpayers where no common interest or relationship exists between the buyer and seller, but otherwise under similar circumstances and conditions.

Neither the statutes nor the tax regulations provide a definition of an affiliated corporation. *See id.* §§ 27-7-3, -15(b); Miss. Tax Reg. 1.27-7-3(1), to -3(17), -15(44) of *Income Tax Law, Rules and Regulations*, found in 1 CCH STATE TAX REP., MISS. ¶¶ 10-410, -068, -072, -076, -060, 11-506 to -509, 13-332, 10-091 to -095, -084, -610 (1974) (paragraph numbers arranged to coincide with respective regulation number). One definition provides: "Actual control of corporations by same interests is insufficient; legally enforceable control of stock of corporations by same interests being required." BLACK'S LAW DICTIONARY 80 (rev. 4th ed. 1968). Two definitions appearing in proposed legislation define affiliated corporations in terms of percentage of ownership.

> Two or more corporations are "affiliated" if they are . . . members of the same group comprised of one or more corporate members connected through stock ownership with a common owner, which may be either corporate or non-corporate, in the following manner:
>
> (1) 50 percent or more of the ruling stock of each member other than the common owner is owned directly by one or more of the other members; and
>
> (2) 50 percent or more of the voting stock of at least one of the members other than the common owner is owned directly by the common owner.

S. 1245, 93d Cong., 1st Sess. § 508 (1973), found in *Hearings on Proposals Regarding State Taxation of Interstate Commerce Before the Subcomm. on State Taxation of Interstate Commerce of the Senate Comm. on Finance*, 93d Cong., 1st Sess. 24-25 (1973) [hereinafter cited as *Hearings*].

S. 2092 provides a similiar definition except it requires at least 80 percent ownership. S. 2092, 93d Cong., 1st Sess. § 505 (1973) found in *Hearings*, *supra* at 55.

California requires that there "be common ownership, directly or indirectly, of more than 50% of a corporation's voting stock . . . ." Keesling, *A Current Look at the Combined Report and Uniformity in Allocation Practices*, 42 J. TAX. 106, 109 (1975).

[4] The State Tax Commission recomputed Universal's gross income using the procedure established in Miss. Tax Reg. 1.0220-08(44). 320 So. 2d at 786. The regulation provides in part:

> When any method which distorts net income among and between affiliates is used, the commissioner may require the consolidation of income of all such affiliates and then proceed to compute the entire net income in accordance with the provisions in the statute, which relates to apportionment of income within and without the state. The tax imposed by this law shall apply to the correct apportioned income of all affiliates as consolidated.

Miss. Tax Reg. 1.0220-08(44), *republished as* Miss. Tax Reg. 1.27-7-15(44) of *Income Tax Law, Rules and Regulations*, found in 1 CCH STATE TAX REP., MISS. ¶ 10-612 (1974).

true value of transactions between affiliate corporations be determined by referring to the compensation which would have been paid to unrelated corporations. As subsection 27-7-15(b) authorizes taxation of domestic corporations only, a tax regulation authorizing the apportionment of the combined incomes of a wholly owned domestic subsidiary and its foreign parent corporation is void, and any tax assessment made under the regulation is invalid. *Universal Manufacturing Corp. v. Brady*, 320 So. 2d 784 (Miss. 1975).

Before the net income of a multistate corporation may be taxed by a state in which the corporation is doing business, the state must determine what part of the corporation's net income is attributable to the taxing state.[5] States employ two primary methods to divide and allocate a multistate business's income: separate accounting and formula apportionment.[6]

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[5] 1 H.R. REP. No. 1480, 88th Cong., 2d Sess. 157 (1964). The United States Supreme Court in Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 452 (1959), *noted in The Supreme Court, 1958 Term*, 73 HARV. L. REV. 126, 170-73 (1959); 57 MICH. L. REV. 903 (1959), held

> that net income from the interstate operations of a foreign corporation may be subjected to state taxation provided the levy is not discriminatory and is properly apportioned to local activities within the taxing State forming sufficient nexus to support the same.

For a discussion of the restriction placed by the commerce clause and due process clause upon state taxation of interstate commerce, see G. ALTMAN & F. KEESLING, ALLOCATION OF INCOME IN STATE TAXATION 19-40 (2d ed. 1950) and J. HELLERSTEIN, CASES AND MATERIALS ON STATE AND LOCAL TAXATION 36-39, 169-256, 528-30 (3d ed. 1969).

[6] G. ALTMAN & F. KEESLING, *supra* note 5, at 89; 1 H.R. REP. No. 1480, *supra* note 5, at 157; Keesling & Warren, *The Unitary Concept in the Allocation of Income*, 12 HAST. L.J. 42, 43 (1960).

Many states use a third method, specific allocation, in conjunction with the formula apportionment method to determine the location of certain types of income. The states generally designate the income which is specifically allocable using one of two methods: (1) Income considered specifically allocable is listed by statute or regulations while the source of all other income is determined by using the formula apportionment method. (2) Other states list particular types of income and add another requirement that the income be nonbusiness income. Nonbusiness income is attributed to a state using specific allocation; business income is usually divided and attributed to a state using formula apportionment. A third method, previously used by a few states, specifically allocated all income derived from a nonunitary business and apportioned unitary business income using formula apportionment. Among the types of income considered specifically allocable are: interest, dividends, rents and royalties from tangible property, and capital gains from the sale of tangible and intangible property. 1 H.R. REP. No. 1480, *supra* note 5, at 197-200; *see* G. ALTMAN & F. KEESLING, *supra* note 5, at 67-68. For a discussion of specific allocation, see *id.* at 67-87; 1 H.R. REP. No. 1480, *supra* note 5, at 197-217.

For an example of a state which uses the first method of determining specifically allocable income by statutory listings, see MISS. CODE ANN. § 27-7-23(1)(a), (3)(1972). Arkansas uses the second method to determine specifically allocable income. ARK. STAT. ANN. §§ 84-2058 to -2062 (Supp. 1975). Business income is defined as

> income arising from transactions and activity in the regular course of the taxpayer's trade or business and includes income for tangible and intangible property if the acquisition, management, and disposition of the property constitute

> Separate accounting proceeds from the theory that the business of a multistate taxpayer can be divided into separate compartments so that its activities within the taxing State can be segregated from its activities elsewhere and accounted for separately.[7]

The separate accounting method produces accurate results provided the business activities within the state can be effectively and realistically isolated from the business activities without the state.[8] A corporation operating retail stores in several states might properly employ the separate accounting method provided each store's activities can be treated as a separate entity doing solely in-state business.[9] If the in-state business activities are closely connected to and a necessary part of the out-of-state business activities, however, the computations produced by separate accounting tend to be based upon the arbitrary decision or conjecture of the taxpayer.[10]

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integral parts of the taxpayer's regular trade or business operations.

Id. § 84-2055(a). "'[N]on-business income' means all income other than business income." *Id.* § 84-2055(e); *see* 1 H.R. REP. No. 1480, *supra* note 5, at 198-99. For a discussion of the terms "business" and "nonbusiness" income, see G. ALTMAN & F. KEESLING, *supra* note 5, at 67-87; Peters, *Revised Multistate Tax Commission Regs Define "Business" and "Nonbusiness" Income*, 40 J. TAX. 122, 122-24 (1974); Peters, *The Distinction Between Business Income and Nonbusiness Income*, found in *Hearings*, *supra* note 3, at 246-60.

[7] 1 H.R. REP. No. 1480, *supra* note 5, at 115.

[8] Keesling & Warren, *supra* note 6, at 44.

[9] 1 H.R. REP. No. 1480, *supra* note 5, at 160-61.

[10] G. ALTMAN & F. KEESLING, *supra* note 5, at 90-92. Since identification of all income producing and cost producing activities is not possible when the in-state business is an integral part of the out-of-state activities, taxpayers applying separate accounting to such a business often resort to artifical and hypothetical pricing standards such as "market price" or "reasonable profit" in order to determine the income attributable to the taxing state.

Market price is the price "that similiar goods bring in the market place in transactions betwen independent parties." A simple example of the market price standard follows: Assume corporation *A* operates retail stores in states *X*, *Y*, and *Z* and has a central purchasing warehouse in state *W*. To determine the income attributable to state *X* for taxing purposes *A* treats shipments from the warehouse to the stores as a sale and charges each store what *A* computes as the "market price" for the goods. This market price becomes the cost for the store in state *X* to which will be added other deductible expenses. The total expenses for the store are then subtracted from the total income the store received for the sale of the goods. The difference between total expenses and total income from sales is the net income corporation *A* attributes to state *X* for taxing purposes. In determining the income attributable to state *W*, corporation *A* will use the "market price" figure as the gross income of the warehouse. From the gross income *A* will subtract the warehouse's deductible expenses and the net figure represents the income attributable to state *W* for taxing purposes.

The market price standard fails to account for savings accrued because of the relation between the store and warehouse. An independent warehouse would likely have greater selling costs and stock a larger product line. Although the warehouse income would reflect these savings and corporation *A*'s income tax for state *W* would be greater, these savings also result from the selling activities of the stores and a portion of this income is attributable to the states where the retail stores are located.

A unitary business,[11] for example, one manufacturing a product in one state

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Under the "reasonable profit" standard the taxpayer assigns a "reasonable profit" to one or more business locations, determined by reference to the profit rates of companies whose business is similar to that of the business location in question. [The taxpayer] then work[s] backward from the profit figure to arrive at the prices at which products are treated as having been sold by one location to another.

Assume corporation *A* manufactured products costing $100,000 in state *X* and sold them in state *Y* for $150,000. Corporation *A* determines that a "reasonable profit" for the manufacture of these products is 10 percent of cost. In the books of the manufacturing business in state *X*, *A* records that the product was sold to the selling outlet in state *Y* for $110,000, attributing $10,000 net income to state *X* for taxing purposes. The selling outlet in state *Y* uses the $110,000 figure as its cost and subtracts it from the selling price, $150,000, producing a net income of $40,000 for taxing purposes in state *Y* (assuming no other expenses). The deficiencies of the reasonable profit standard are clear: (1) failure to account for income earned as a result of the relation between the in-state and out-of-state activites, (2) the reasonable price figure is an assumed figure, and (3) savings made in the manufacturing part of the business will not affect its income but will be reflected in the selling state.

Regardless of the standard used to establish the price, several other difficulties inherently exist in the application of separate accounting to in-state activities of a multistate business which are not separate and distinct: (1) The arbitrary nature of establishing prices invites disagreement between the taxpayer and tax officials; (2) rarely does an independent business conducting the same activity under the same circumstances and conditions exist to provide a standard for comparison purposes for establishing the market prices; (3) sufficient information rarely is available for determining market price or reasonable profit; (4) most states acknowledge that separate accounting is not capable of accurately determining the overhead expenses (*e.g.*, executive salaries) attributable to each location, *e.g.*, Miss. Tax Reg. 1.27-7-23(7)(a)(2) of *Income Tax Law, Rules and Regulations*, found in 1 CCH STATE TAX REP., MISS. ¶ 12-435 (1974). Finally, in a multistate interdependent corporation, "[t]o the extent that the cost of a product decreases as the quantity purchased or manufactured increases, the sales volume of an entire company affects the product cost, and thus the profit, of each of its distribution outlets." Separate accounting is simply not capable of accurately attributing income in such a situation. 1 H.R. REP. No. 1480, *supra* note 5, at 163-67 (footnote omitted); *see* G. ALTMAN & F. KEESLING, *supra* note 5, at 90-96.

[11] Various definitions are given for a unitary business. "[A] business is 'unitary' if the several business establishments of the company are mutually dependent upon each other for their success." 1 H.R. REP. No. 1480, *supra* note 5, at 167; *see* G. ALTMAN & F. KEESLING, *supra* note 5, at 101. In Butler Bros. v. McColgan, 17 Cal. 2d 664, 678, 111 P.2d 334, 341 (1941), *aff'd*, 315 U.S. 501 (1942), the California Supreme Court defined a unitary business as one possessing "(1) unity of ownership; (2) unity of operation as evidenced by central purchasing, advertising, accounting and management divisions; and (3) unity of use in its centralized executive force and general system of operation." Mr. Keesling and Mr. Warren criticize these definitions and contend that the "sole criteria of definition" is the relation of the business to the taxing jurisdiction. Keesling & Warren, *supra* note 6, at 47-48.

> Where the properties and activities within the jurisdiction are an inseparable portion of a business carried on within and without the jurisdiction, the computation of the income attributable thereto requires a computation of the

and selling the product in several others, is generally not suited for separate accounting treatment since the activities in one state are dependent upon and related to the activities in other states.[12] In *Mississippi State Tax Commission v. Tennessee Gas Tramsmission Co.*,[13] Mr. Justice Ethridge stated:

> The test in determining what is a unitary business is whether all factors are essential to the ultimate realization of gain. The operations conducted in one state benefit and are benefited by the operations conducted in another state. If its various parts are interdependent and of mutual benefit, so as to form one integral part rather than several business entities, it is unitary.[14]

Due to the difficulties of assessing a unitary business's income by the separate accounting method, most states use an apportionment formula to determine the

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income of the business as a whole or as a unit and an apportionment or allocation of the total to the various parts. This necessity of dealing with the business as a *unit* taking into account income from property and activities without the jurisdiction as well as within, gives rise to the classification of the business as a unitary business. Thus a unitary business may be defined simply as any business which is carried on partly within and partly without the taxing jurisdicton.

Id. at 46.

A separate business, where separate accounting is applicable, is one "conducted wholly within a particular taxing jurisdiction." *Id.*

The unitary business concept apparently has its origins in the unit rule used by states to determine how much property or capital stock belonging to a multistate transportation business was located within the state for taxing purposes. G. ALTMAN & F. KESSLING, *supra* note 5, at 23-24; Hellerstein, *Recent Developments in State Tax Apportionment and the Circumscription of Unitary Business*, 21 NAT'L TAX J. 487 (1968), found in *Hearings, supra* note 3, at 167; *see* Butler Bros. v. McColgan, 315 U.S. 501, 508 (1942); Adams Express Co. v. Ohio, 165 U.S. 194, 220-22 (1897) and cases cited therein; Mississippi State Tax Comm'n v. Tennessee Gas Transm. Co., 239 Miss. 191, 207, 116 So. 2d 550, 556 (1959), *appeal dismissed*, 364 U.S. 290 (1960).

If a multistate corporation's in-state and out-of-state activities are related operationally or economically a state may find that the activities constitute a unitary business. Keesling & Warren, *supra* note 6, at 50. Operational units exist where the "property or the services of individuals directly contribute to the earning of income, which is the inseparable product of these combined elements." *Id.* An example would be a business manufacturing goods in state *A* and selling them in state *B*. *Id.*; *see* Underwood Typewriter Co. v. Chamberlain, 254 U.S. 113 (1920).

> Economic unity exists where there are two or more series of activities, which from an operational standpoint, are separate and distinct from one another, but which because of economic interrelationship, should be considered as constituting a single business.

Keesling & Warren, *supra* note 6, at 51; *see* Butler Bros. v. McColgan, 17 Cal. 2d 664, 111 P.2d 334 (1941), *aff'd*, 315 U.S. 501 (1942) (economic benefit to affliated group members derived from common large volume purchasing).

[12] G. ALTMAN & F. KEESLING, *supra* note 5, at 90.

[13] 239 Miss. 191, 116 So. 2d 550 (1959), *appeal dismissed*, 364 U.S. 290 (1960).

[14] *Id.* at 206-07, 116 So. 2d at 556.

portion of the corporation's income attributable to the taxing state.[15] The apportionment formula is based on various factors such as property, payroll, and sales[16] and is applied to the corporation's total net income.[17] The United States Supreme Court has held that an apportionment formula meets due process requirements if it is fairly calculated to assign to the taxing state that portion of the net income reasonably attributable to the business done there.[18] The

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[15] 1 H.R. REP. No. 1480, *supra* note 5, at 168; *e.g.*, Miss. Tax Reg. 1.27-7-23(7)(c) of *Income Tax Law, Rules and Regulations*, found in 1 CCH STATE TAX REP., MISS. ¶ 12-435 (1974) (manufacturers only).

[16] G. ALTMAN & F. KEESLING, *supra* note 5, at 97.

[17] The formula apportionment method rests upon the theory that the portion of a multistate corporation's net income attributable to a particular state is directly related to the corporation's income producing activity within the state as compared to its total income producing activity. To measure a corporation's presence within the state a formula containing various factors is utilized. Although the three factors of property, payroll, and sales are not the only ones used, in 1964, 26 of the 38 states imposing a tax upon net income or measured by net income, used a formula with these three factors. Some states use a one or two factor formula. A simple example of the use of a formula to apportion income follows: Assume corporation *A* manufactures its product in state *X* and sells it in states *X*, *Y*, and *Z*. *A*'s total net income is $30,000. State *Y* uses a three factor formula of sales, property, and payroll. Corporation *A* attributes to state *Y* property valued at $200,000, payroll valued at $25,000, and sales valued at $500,000. Corporation *A*'s total property, payroll, and sales are valued at $800,000, $75,000, and $2,000,000 respectively. Assuming each factor is given equal weight the computation is:

$$\frac{\dfrac{\text{in-state property}}{\text{total property}}\left(\dfrac{200{,}000}{800{,}000}\right) + \dfrac{\text{in-state payroll}}{\text{total payroll}}\left(\dfrac{25{,}000}{75{,}000}\right) + \dfrac{\text{in-state sales}}{\text{total sales}}\left(\dfrac{500{,}000}{2{,}000{,}000}\right)}{3} = \text{apportionment ratio (5/18)}$$

5/18 x $30,000 (total net income) = $8,333.33 (amount attributed to state *Y* as taxable income). State *Y* then applies its tax rate to $8,333.33 to determine the tax corporation *A* owes the state. 1 H.R. REP. No. 1480, *supra* note 5, at 99, 168-70. For a more complete discussion of the mechanics of the apportionment formula method and the significance of the various factors, see *id.* at 168-97; G. ALTMAN & F. KEESLING, *supra* note 5, at 107-31.

[18] Butler Bros. v. McColgan, 315 U.S. 501, 506 (1942)(upheld tax assessment based on formula although in-state activities of foreign corporation showed a loss); Bass, Ratcliff, Gretton, Ltd. v. State Tax Comm'n, 266 U.S. 271 (1924) (upheld formula applied to income from activities outside United States); Underwood Typewriter Co. v. Chamberlain, 254 U.S. 113 (1920) (formula with single factor upheld as reasonable); United States Glue Co. v. Town of Oak Creek, 247 U.S. 321 (1918)(general income tax upon domestic corporation may include net income derived from interstate commerce transactions). In Hans Rees' Sons, Inc. v. North Carolina, 283 U.S. 123 (1931), a single-factor formula was

Mississippi Supreme Court has adopted a rule of strict construction when interpreting statutes and regulations dealing with the state's taxing power.[19] As a consequence, although Mississippi provides by statute[20] that the gross income of a foreign corporation engaged in multistate unitary business[21] shall be computed by the formula apportionment method,[22] there appears to be a reluctance to apply the method to its fullest extent.[23] Several commentators contend that

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held to be so arbitrary and unreasonable as to violate the due process and equal protection clauses of the fourteenth amendment, and in Maxwell v. Kent-Coffey Mfg. Co., 204 N.C. 365, 168 S.E. 397, *aff'd per curiam*, 291 U.S. 642 (1933), another single-factor formula was held not to be so unreasonable as to violate the due process clause.

The Court has held that the apportionment formula need not produce a perfect allocation of income. International Harv. Co. v. Evatt, 329 U.S. 416 (1947) ("rough approximation rather than precision is sufficient").

[19] *E.g.*, Crosby v. Barr, 198 So. 2d 571, 573 (Miss. 1967); State Tax Comm'n v. Edmondson, 196 So. 2d 873, 875 (Miss. 1967).

> The language of the statute is plain and unambiguous, and clearly authorizes the interest deduction taken by the [taxpayer] on its return. The [Commission] says that it would be manifestly unfair to permit a multi-state corporation to take [the deduction]. If this is correct, then it is an argument that should be addressed to the legislature and not to the courts. The function of the court is to construe the legislative act and not to add to it or deduct from it that which the legislature itself did not enact into the statute.

Monaghan v. Reliance Mfg. Co., 236 Miss. 462, 470, 111 So. 2d 225, 228 (1959).

[20] Miss. Code Ann. § 27-7-23(c) (1972).

[21] The Mississippi Supreme Court and the tax regulations recognize the distinction between unitary and nonunitary income. *E.g.*, Tenneco, Inc. v. Barr, 224 So. 2d 208, 214-15 (Miss. 1969); Mississippi State Tax Comm'n v. Tennessee Gas Transm. Co., 239 Miss. 191, 204-07, 116 So. 2d 550, 555-56 (1959); Miss. Tax Reg. 1.27-7-23(7) of *Income Tax Law, Rules and Regulations*, found in 1 CCH State Tax Rep., Miss. ¶ 12-435 (1974).

[22] Mississippi applies a three factor formula to unitary manufacturing businesses. The three factors are (1) "manufacturing assets owned or used" within the state; (2) "manufacturing labor"; (3) sales. Miss. Tax Reg. 1.27-7-23(7)(c) of *Income Tax Law, Rules and Regulations*, found in 1 CCH State Tax Rep., Miss. ¶ 12-435 (1974). Special provisions exist for apportioning the income of pipelines, *id.*(d); airlines, *id.*(e); motor carriers, *id.*(f); public utilities, *id.*(g); and contractors, *id.*(h); *see* Columbia Gulf Transm. Co. v. Barr, 194 So. 2d 890 (Miss. 1967) (pipeline formula); Reliance Mfg. Co. v. Barr, 245 Miss. 86, 146 So. 2d 569 (1962) (manufacturing formula); Mississippi State Tax Comm'n v. Tennessee Gas Transm. Co., 239 Miss. 191, 116 So. 2d 550 (1959) (pipeline and manufacturing formula). *See also* Stone, *State Taxation*, 31 Miss. L.J. 271, 278-80 (1960).

[23] The commissioner takes the position that employment of an apportionment formula is . . . merely an approximation of the net income realized from operations conducted within and without the geographical limits of the State of Mississippi. For that reason, the use of an apportionment formula will be discouraged and only in those cases where it is not possible to accurately and correctly determine Mississippi net taxable income by the books of account of the taxpayer, will such formulae be accepted as the basis of measuring the Mississippi income tax liability.

Miss. Tax Reg. 1.27-7-23(7)(k) of *Income Tax Law, Rules and Regulations*, found in 1 CCH State Tax Rep., Miss. ¶ 12-435 (1974); *see* McWilliams Dredging Co. v. McKeigney, 227 Miss. 730, 747, 86 So. 2d 672, 677, *appeal dismissed*, 352 U.S. 807 (1956); 1 H.R. Rep.

the apportionment formula method is applicable to a unitary multistate business conducted by affiliated corporations as well as the multistate business conducted by a single corporation.[24]

> The authority for this procedure does not rest on any special provisions, such as those relating to the filing of consolidated returns or those which authorize the administrative agency to reallocate income and deductions between related taxpayers in order to prevent the evasion or avoidance of taxes. Instead, the authority is implicit in the general provisions of the law relating to the allocation of income . . . which authorize the administrative agency to determine the income reasonably attributable to sources within the taxing state. This procedure likewise does not result in the disregard of the separate corporate entities of the various members of the affiliated group.[25]

At least two states require affiliated corporations engaged in a unitary business to use the apportionment formula method to compute the net income attributable to the taxing state absent specific statutory authority.[26] In other states statutory or regulatory provisions have been adopted authorizing apportionment among affiliated corporations.[27] Many states have not been as liberal in interpreting their statutes.[28] In addition, where the statutes provide one method of

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No. 1480, *supra* note 5, at 170; G. ALTMAN & F. KEESLING, *supra* note 5, at 148. Although the Supreme Court has upheld the application of an apportionment formula to a mercantile corporation, Butler Bros. v. McColgan, 315 U.S. 501 (1942), Mississippi apparently prefers separate accounting for such businesses. *See* note 22 *supra*.

[24] G. ALTMAN & F. KEESLING, *supra* note 5, at 169; *Hearings*, *supra* note 3, at 159-60 (1973) (testimony of Jerome H. Hellerstein); Keesling, *supra* note 3, at 106.

> In any case where a business would be considered unitary if conducted by one taxpayer, it should likewise be so considered even though conducted by two or more affiliated corporations. Just as a state may look beyond its borders and take into account the entire income of a business in arriving at a determination of the amount of income reasonably attributable to the activities conducted within the state, so in the case of a group of affiliated corporations engaged in the conduct of a business, it may look at the total income of the group to determine the amount of income attributable to the portion of the business conducted within the state by one or more of the members of the group.

Keesling & Warren, *supra* note 6, at 57.

[25] Keesling & Warren, *supra* note 6, at 57-58; *see* G. ALTMAN & F. KEESLING, *supra* note 5, at 169-70, 174; Keesling, *supra* note 3, at 108-09.

[26] Edison Cal. Stores, Inc. v. McColgan, 30 Cal. 2d 476, 176 P.2d 697 (1947); The Coca Cola Co. v. Department of Revenue, ___ Ore. ___, 533 P.2d 788 (1975); Zale-Salem, Inc. v. State Tax Comm'n, 237 Ore. 261, 391 P.2d 601 (1964).

[27] Peters, *Use of Combined Reporting Required by Increasing Number of States*, 41 J. TAX. 375 (1974); 1 H.R. REP. No. 1480, *supra* note 5, at 244.

[28] *E.g.*, J.G. McCrory v. Commissioner of Corp. & Taxation, 280 Mass. 273, 182 N.E. 481 (1932)(without statutory authority formula could not be applied to unitary business conducted by affiliated corporation); People *ex rel.* Studebaker Corp. of America v. Gilchrist, 244 N.Y. 114, 155 N.E. 68 (1926) (Where affiliated corporation conducts unitary business the tax commissioner could not apply apportionment formula to their combined income absent statutory authorization; statute being construed was amended subsequent to the filing of this case).

adjusting the income derived from transactions between affiliated corporations, some courts have construed the statutes as providing an exclusive method.[29] Those states applying the apportionment method to a unitary business conducted by affiliated corporations usually require that the taxed corporation submit a combined report.[30] Although cases challenging the validity of the combined report have been appealed to the United States Supreme Court, it has as yet refused to rule on this point.[31]

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[29] *E.g.*, *In re* Morton Salt Co., 150 Kan. 650, 95 P.2d 335 (1939) (statute authorized combining income of affiliated corporation conducting unitary business only if tax evasion is found); Burroughs Adding Mach. Co. v. Wisconsin Tax Comm'n, 237 Wis. 423, 297 N.W. 574 (1941) (statute provides that distorted income from contracts between affiliated corporations will be recomputed based on what true income would have been but for the relation, with due regard for reasonable profits of unrelated corporations).

Many state statutes require that where the tax administrator finds the income derived from transactions between affiliated corporations is not accurate, the administrator will determine the price based on the standard of what the income would have been if the corporations were unrelated and "dealing with one another in good faith at arm's length." This standard is inadequate when a unitary business is involved for the same reasons that separate accounting is inadequate for apportioning the income of a unitary business. G. ALTMAN & F. KEESLING, *supra* note 5, at 170, 174-75. See discussion at note 10 *supra* on deficiencies of separate accounting when applied to a unitary business conducted by a single corporation.

[30] Peters, *supra* note 27, at 375. A combined report is different from a consolidated return. A " 'combined report' is . . . a report in which the taxable corporation's net income is combined with the net income of a nontaxable out-of-state corporation." A " 'consolidated return' is . . . permitted or required of two or more affiliated corporations each of which is subject to the taxing state's jurisdiction. If such a return is fully 'consolidated' then the multicorporate enterprise is, in effect, regarded as one entity with all intercorporate transactions, including intercorporate dividends, being eliminated." 1 H.R. REP. NO. 1480, *supra* note 5, at 245.

> [T]he purpose of the combined report is to insure that the income of a business conducted partly within and partly without the taxing state shall be determined and apportioned in the same manner regardless of whether the business is conducted by one corporation or by two or more affiliated corporations. In cases where the business is conducted by one corporation, the income is computed as a unit and apportioned by means of an appropriate formula, usually the three-factor formula of property, payroll and sales . . . .
>
> When the combined report is employed, exactly the same procedure is followed, and the same results obtained, in cases where the business is conducted by more than one corporation. The income is still computed as a unit just as it would be if the business had been conducted by one corporation only.
>
> Furthermore, the income is apportioned by means of an appropriate formula, again, just as it would be if the business had been conducted by one corporation.
>
> Thus, so far as determining the amount of business income attributable to a particular state is concerned, no advantage is obtained, and no detriment suffered, as the result of employing a number of corporations rather than one to operate the business.

Keesling, *supra* note 3, at 106.

[31] *E.g.*, Chase Brass & Copper Co. v. Franchise Tax Bd., 10 Cal. App. 3d 496, 95 Cal. Rptr. 805, *appeal dismissed and cert. denied*, 400 U.S. 961 (1970), *noted in* 7 CALIF.

In the instant case the court ruled, for purposes of determining gross income, that subsection 27-7-15(b) clearly requires that the true value of transactions occurring between affiliated corporations be determined by referring to the compensation an unrelated corporation doing the same work would have been paid. Since Universal derived its gross income from an affiliated corporation, the court held that the State Tax Commission must follow the statutory method to determine the true value of the work performed by Universal. As Miss. Tax Reg. 1.27-7-15(44) authorized a method for determining an affiliated corporation's gross income contrary to the method in section 27-7-15(b), the court, relying on the rule that a regulation is void if adverse to the statute under which it is promulgated, held void that part of Miss. Tax Reg. 1.27-7-15(44) which was repugnant to the statute and ruled invalid the additional tax assessment made under the regulation.

The immediate impact of the case is clear: Under the existing statute the State Tax Commission may not compute the taxable income of a multistate unitary business conducted by affiliated corporations in the same manner as a single foreign corporation conducting the same unitary business. The case appears to be one of form over substance. Foreign corporations conducting part of a unitary business in Mississippi may be able to reduce their income tax payments by incorporating the activities in Mississippi and operating as a wholly owned subsidiary. Under the instant decision, corporations which can establish the true value of their transactions can preclude the State Tax Commission from recomputing the net income attributable to the state as the result of their in-state activities. The same deficiencies encountered in the application of the separate accounting method to a unitary business conducted by a multistate corporation are present in applying the procedure outlined in subsection 27-7-15(b) to a unitary business conducted by affiliated multistate corporations, i.e., the procedure is arbitrary and based solely on conjecture as to what the income from unrelated corporations would have been. The statutory procedure is adequate only where the corporate activities of the domestic affiliate are not part of a unitary business. Since Mississippi apparently recognizes the formula apportionment method as the more accurate procedure for allocating income derived from a unitary business, it seems anomalous to reject that method merely because the foreign corporation chooses to incorporate its in-state activities. The State Tax Commission conceivably might attempt to impose the formula apportionment method on affiliated corporations relying on either subsections 27-7-13(3)[32] or 27-7-23(1)(c).[33] In accord with its history of strictly construing

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W.L. REV. 508 (1970). For a discussion of *Chase Brass & Copper Co., supra*, see Peters, *An Analysis of Important Recent Developments in the State and Local Tax Area*, 39 J. TAX. 172, 175 (1973).

[32] MISS. CODE ANN. § 27-7-13(3)(1972) provides:

> (3) But, if no such method and manner of accounting has been employed, or if the method or manner employed does not clearly reflect the income, the computation shall be made upon such basis and in such manner as, in the opinion of the commissioner, clearly reflects the income.

Since this statute deals primarily with the taxpayer's accounting period and maintenance of accounting records for determining net income, the court probably would rule

administrative regulations, however, the Mississippi Supreme Court would most likely reject a liberal interpretation of these taxing regulations. The court's message is clear: If the State Tax Commission wants authority to compute the tax of a unitary business conducted by affiliated corporations and a unitary business conducted by a single corporation in the same manner, it must go to the legislature for enabling legislation.

Robert H. Pedersen

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that the legislature did not contemplate that this statute authorized applying the formula apportionment method to affiliated corporations.

[33] MISS. CODE ANN. § 27-7-23(1)(c)(1972) provides:

> (c) In the cases of gross income derived from sources partly within and partly without the state, the net income may first be computed by deducting the expenses, losses, or other deductions apportioned or allocated thereto, and a ratable part of any expenses, losses, or other deductions which cannot definitely be allocated to some item or class of gross income; and the portion of such taxable income attributable to sources within the state may be determined by processes or formulas of general apportionment, prescribed by the commissioner, with the approval of the governor.

Standing alone, this section appears to authorize application of the formula to affiliated corporations conducting a unitary business. The heading of the statute and the first subsection specifically provide, however, that the statute applies only to nonresident and foreign corporations. The State Tax Commission might argue that the legislature recognized the formula method as the best procedure for determining the income attributable to the state when foreign corporations are involved and impliedly authorized that method when affiliated corporations conduct business within and without the state.

BOOK REVIEWS

What You Must Know to Manage a Charitable Foundation

By Stanley Pressment.
Greenvale, New York: Panel Publishers. 1975. Pp. 1003. $99.00.

*Karen Oakes Green**

Speaking of the vast and complex provisions of the Tax Reform Act of 1969, one commentator made the following observation of the Act's effect in the field of charitable foundations: "It changes the former lackluster field of charitable organizations into one in which only professionals should dare to tread."[1] Quite possibly with this thought in mind, Stanley Pressment saw the need for a tax practitioner's guide to the management of charitable foundations.

Assuring his reader of the continued vitality of these organizations, the author, in his introduction, promises to clarify this formidable body of law which now restricts the operations of charitable foundations. However, the result of his efforts is little more than a compilation of the applicable sections of the Internal Revenue Code and supporting Treasury regulations, illuminated by a few brief comments and even fewer practical examples. In this area of tax law, one which is relatively new and uninterpreted by cases and revenue rulings, emphasis should be placed on detailed analysis of the precise language of the code sections and regulations, followed by ample discussion of the reasons for enactment, the objectives sought, and the overall operational and substantive effect of the statutory pattern. The author's treatment is thus an inadequate response to the needs of the tax practitioner in this area.

The main text of the book consists of four major sections. The first two of these sections, how to plan with private foundations and how to secure tax-exempt status, hold the greatest potential for thought-provoking, innovative analysis on the part of the author. Nevertheless, the "planning" section is merely a sketchy summary of the basic statutory provisions and the tax benefits available to foundations and donors. It alludes to only one creative planning technique: use of the charitable foundation to increase the marital deduction for estate tax purposes.

In view of the author's years of experience in the Rulings Division (exempt organizations) of the Internal Revenue Service, the reader anticipates that the second section, on securing exempt status, will yield valuable insights into IRS ruling policy. These expectations are met, however, by lengthy quotation from the regulations, explanations which read like the code itself, and references to a collection of suggested forms in the appendix, generally indicative of what is acceptable to the IRS.

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[1] Sugarman, *Foundation Operations Under the Tax Reform Act*, 48 Taxes 767, 767 (1970).

A collection of the rules on excise taxes imposed on private foundations forms the basis for the third section of the main text. Here, the author devotes a portion of his discussion to an analysis of the congressional purposes behind enactment of these provisions, citing specific examples of prohibited activities to which these taxes relate. Ambitiously promising to present the reader with a simple set of ground rules which will enable the private foundation to function within the new laws with little or no restriction on its activities, the author completes his text with a guide to operating the private foundation under the Internal Revenue Code. His "simple ground rules," however, consist of an outline of the statutory duties for filing and reporting, coupled with the general indication that a private foundation can not engage in "tainted" activities or deal with "disqualified" persons.

With a few exceptions, the format of the book is somewhat more commendable. Use of the looseleaf concept, by means of which the author can readily update the book as new cases and revenue rulings interpret the law, is particularly appropriate for this developing subject matter. In addition, the usual table of contents and numerous topical headings serve to guide the reader handily through the proliferation of materials. The lengthy appendix, however, reprinting the relevant code sections, regulations, and official forms of the Internal Revenue Service, is of questionable utility to the tax practitioner who generally has these materials on hand. The book concludes with a helpful dictionary of terms and a short index.

As a tool for the serious student or teacher of tax, Mr. Pressment's work is seriously deficient in substantive analysis. As an aid to the tax practitioner, his work has some limited value as a collection of the technical rules of operation. One can only hope that his later revisions and additions to the book will utilize a more analytical and creative approach to the subject matter.

How to Form Your Own Corporation Without a Lawyer for Under $50.00

By Ted Nicholas.
Wilmington, Del.: Enterprise Publishing Co. 1972.
Pp.103. $7.95 (paper).

*E. Clifton Hodge, Jr.**

Put in terms of current slang, this book is a "rip-off." Its equivalent could be prepared by most lawyers who have knowledge and experience in corporate law in less than 10 hours. It is merely an outline of hornbook corporate law followed by copies of various corporate documents which can be obtained from officials in all states free of charge. Although the book offers nothing of substance to either the practitioner or the theorist, it is worthwhile to analyze why books of this nature can be a financial success.

Of course, everyone interested in corporate law knows about Ted Nicholas. According to one of the advertisements for the book, "Mr. Nicholas has been to the White House to personally meet with the President, Lyndon B. Johnson . . . ." It is hard to think of a better qualification for writing a book on corporate law. Also according to an advertisement,

> [t]he motivating factor behind his book in his strong belief in the concept that an individual businessman should have available to him the knowledge and benefits heretofore available only to the largest corporations in America.

Certainly, large corporations would be disturbed to learn that, even prior to the publication of this book, lawyers in places like rural Mississippi were in on the secret of incorporation.

To make this review fair, it should be mentioned that favorable comments about the book have been made by well-known corporate authorities, including the following: President, Automated Business Informatic, Inc., New York; Gordon M. Towns, President A.U.L.L., Inc., Arkansas; J.S. Newark, Delaware; and Howard Jacobs, President, Omnitron, Inc., Canada. Among such endorsements are the following:

> "[W]as quoted $1,000 by lawyer for 3 corporations . . . book saved me $3,000."
> "Mr. Nicholas' book is invaluable to anyone desiring to establish himself in the Corporation World."

In the acknowledgments, Nicholas gives thanks to the staff of the Secretary of State of Delaware. This seems fitting, since this office probably supplied the forms which consume a significant portion of this brief book. Also, thanks is given by Nicholas to Ayn Rand "who has provided me valuable identifications through her books although we've never met." *Identifications?*

The gist of the introductory material is that the act of incorporation is simple, that no professional assistance is needed, that lawyers try to complicate

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the process, and that even though some lawyers would like to charge lower prices for incorporation, minimum fee schedules prohibit them from doing so. It is doubtful that anyone with business experience could fall for this scheme, but many persons have no idea of the complexities which can be involved with forming a corporation. Among the items which can complicate the situation are the shareholders' agreement on stock transfer restrictions, conveying assets to the corporation, federal income tax consequences, compliance with securities regulations, employment agreements, distribution of voting power, creation of separate classes of stock, and providing an adequate capital structure. It is not possible for the average layman to handle these matters, even if he had memorized Nicholas' book.

Lawyers themselves frequently seek refuge from the increasing complexity of the law. It is probable that many lawyers handling an incorporation do no more than this book suggests is necessary, and in most of these situations the client will ultimately suffer from the lack of planning and analysis. It seems that there ought to be some remedy to prohibit the exploitation sought by this book, but any such remedy would logically be sought by lawyers with the result that there would be a claim that the lawyers are trying to protect their unreasonably high fees, giving Nicholas new ammunition for the advertisement of his book.

The problem is that it is too easy to obtain a corporate charter. The process lends itself to abuse because there are no inherent safeguards for careful planning. Incorporation of a business can have an unanticipated and profound impact on an individual's economic situation. With a simple filing of papers, a person subjects his business to complicated state corporate statutes and federal income tax statutes. It is not a step that should be taken lightly. This book is a disservice to the public because it exploits the belief that lawyers are materialistic makers of busywork, and it attempts to dupe the naive into believing that the process of incorporation is simple.

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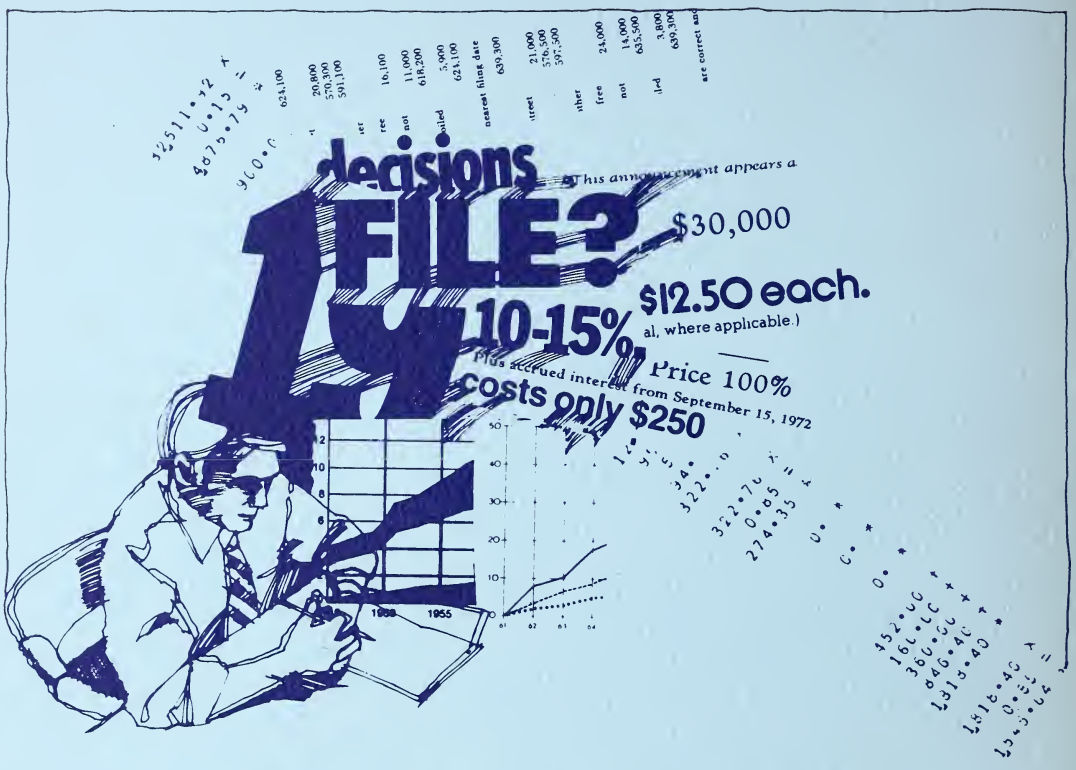

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